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"Arbitration, an Upcoming Pillar in the Judicial System?"

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Abstract

In this 21st century and with a population of around 132 crores, is it humanely possible to look after every single dispute both effectively and as efficiently as it should be? The answer is no. The workload will always be more than the actual workforce. But then what would be a viable solution for this problem? After all every problem has a solution or if there isn't one then there should be. The simple answer to such problem is finding alternatives. The courts are so overburdened with the existing work that some alternatives must be found and one of such alternative which is gaining momentum at a never seen before pace is the concept of "Arbitration". In this paper we have critically analysed the importance of Arbitration, how it is becoming popular and whether it can be a viable alternative to the normal litigation in courts by structurally analysing the advantages, disadvantages, certain sections relating to arbitrators and also covering international arbitration along with it. The main idea of this paper is to clarify to a layman what arbitration actually is and for whom such proceedings are viable.

Introduction

With the ever-increasing number of disputes in this era, the workload is increasing at such a pace that our judicial system is not able to cope up with the pressure resulting in loads of cases being unattended and many of which are going on for years. Courts are so overburdened with the excessive workload that the efficiency is in some way now being effected. In such a time where countless cases are hitting the courts a new way of settling the disputes is gaining widespread attention. Such way being known as '"Arbitration". It is basically an out of the court settlement where the parties choose an Arbitrator to adjudicate upon their disputes. It is meant to give some relief to the courts which are overburdened with the workload. It is not a very known fact that the first time such settlement was sought was in Jay Treaty in 1794 between united states and Great Britain.[1] Arbitration generally deals with the commercial disputes. It is very common for companies to have included an Arbitration clause in their agreements, mainly because of the heavy cost which is usually incurred in the judicial proceedings. Arbitration differs from the judicial proceedings in number of ways. But is Arbitration a valuable alternate to the litigation in courts? To answer this question we will

1https://history.state.gov/milestones/1784-1800/jay-treaty

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have to look at the advantages, disadvantages and the provisions of such legislations concerning arbitration and its position in India.

Some of the advantages of Arbitration are –

- Cost involved is much less than the judicial proceedings
- Parties have an option to choose the arbitrator
- It is much faster than the normal judicial proceedings
- Courts have a minimal say in the arbitration proceedings
- In non binding arbitration agreements parties may still approach the courts

The New York convention is one of the most significant convention in this aspect.(footnote) All the major countries are a signatory. It basically provides such standards which are to be followed which makes it easier for the enforcement of awards in International Arbitration.

Position in India

It would not be wrong to state that India is one of the countries which has recognised the need for this system of out of the court settlement to minimise the excessive workload and have successfully passed the '"Arbitration and Conciliation Act 1996" which lays out certain provisions for the same. This act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. It contains provisions for both the domestic and international commercial arbitration. Such act was passed to make sure that the role of courts and their intervention in the arbitration proceedings are minimised. **Bhatia international vs Bulk trading**[2] **i**s one of the landmark case decided by supreme court extending the applicability of such provisions of the act. One of the notable features of such act is the the role of judiciary is sought to be minimised, such is made clear by the provisions stating that the parties in no other circumstance except the following may approach the courts in a matter of arbitration -

1) To seek any interim measure or injunction
2) To appoint the arbitrator in such cases where the parties fail to do so

Thus it is made clear that the role of judiciary is kept at minimal. The Arbitration agreements can be binding and non binding. In any case the agreements must be in writing and the Indian judiciary will look for the words used in the agreement to determine whether such agreement is voluntary or whether such dispute comes under arbitration or not.

Now lets talk about those who actually adjudicate the arbitration proceedings. Here we are going to discuss about the arbitrators

2 (2003) 5 SCC (Jour) 22

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Appointment of arbitrator

The Indian law does not lay down any specific set of qualifications as to appointment of arbitrators. The procedure of arbitration from beginning to end is guided by the arbitration agreement as between the parties. This agreement includes the procedure of arbitration, the circumstances under which arbitration is the solution, the appointment of arbitrators and other quintessential clauses for arbitration. The procedure of arbitration is guided by the parties to the arbitration ranging from who will be the arbitrators to the place of arbitration to the date, time etc. The act[3]lays down under section 11 about the appointment of arbitrators. The arbitrator is appointed by the parties to the arbitration and the number of arbitrators is also decided by them, however it is laid down in the act[4] that the number of arbitrators should not be even. The statutory requirement of odd numbers of arbitrators is a derogable provision[5]. In case there is a dispute between the parties over the number of arbitrators there shall be appointment of a sole arbitrator as per the act.[6] The use of words "the parties are free to determine the number of arbitrators" in the provision indicates that if the parties agree to an even number of arbitrators they can further proceed with so if they agree not to challenge the award of such a tribunal and accept the award granted.

Section 11 of the Arbitration Act

An arbitrator can be a person of any nationality unless decided otherwise by the parties as given in section 11(1) of the Arbitration act. The parties to the agreement are free to appoint a person of any nationality to be the arbitrator. As per sub section 2 of section 11 the parties are free to agree to a procedure for appointment of the arbitrator subject to sub-section 6 of section 11. In case of failure of agreement between parties as per sub section 2 if there is appointment of three arbitrators each party can appoint one arbitrator and the two appointed arbitrators can appoint the third arbitrator who shall be the presiding arbitrator. As per sub section 4 if the appointment of arbitrators has to be according to sub section 3 then if a party fails to appoint the arbitrator within thirty days from receipt of request from the other party or if both appointed arbitrators fail to appoint the third arbitrator within thirty days from their appointment then upon request from one of the parties the Chief Justice or any other institution designated by him can make such appointment. In case of appointment of a sole arbitrator if the parties do not agree for appointment within thirty days from the day a request was made by the other party , then upon the request of one of the parties such appointment can be made by the Chief Justice or any other institution designated by him. In case of any disparity between the parties on the appointment of arbitrators the Chief Justice or any person or any institution designated by him can make such appointment on request of any one of the parties unless the agreement secures the appointment in case of such failure. The decision of the Chief Justice or any person or any institution designated by him is final and while making such appointment the qualifications or specifications as per the agreement must be catered to by them as well an impartial arbitrator must be appointed. In case of international commercial

3Arbitration and conciliation act , 1996
4 Section 10 of Arbitration and conciliation act , 1996
5Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 56.
6 Arbitration and conciliation act,1996

arbitration the requests are to be made to the Chief Justice of India and for other arbitration matters it is the Chief Justice of the High Court under whose jurisdiction the matter lies.

Ground for challenging the appointment of arbitrator

The arbitrators when approached for appointment are suppose to make a disclosure in writing of any interest whatsoever in the arbitral proceedings and during the arbitral proceedings make the parties aware in writing if not already informed about any such thing. As per section 12 of the act the appointment of arbitrator can be challenged on grounds of impartiality or violation of qualification laid by the agreement of an agreement. Parties can challenge appointment only on reason they are made aware of after appointment.

Another aspect which must be discussed as for the arbitrators is what makes a good rbitrator or in other words what qualities he/she must possess.

Qualities of a good Arbitrator

- One of the most important quality and a must qualification of a good arbitrator is that he/she must possess the needed technical and legal knowledge to be able to make sound judgements.
- He/she must not possess any kind of interest towards any of the parties or in other words he must be a party impartial
- A good Arbitrator must never exceed his/her jurisdiction
- He/she must always look out for the much debated principles of natural justice.
- The basic requirement of a good arbitrator is that he/she must be a neutral person having no interest in the subject matter of the dispute and must possess necessary legal and technical knowledge.

International Arbitration

Now lets look at another aspect of arbitration i.e. International Arbitration. Contracts or agreements between two parties are not limited to a particular domestic state. Companies around the globe are indulging into various contracts and agreements with each other. Now one question which would come in the mind of many is how the arbitration award would be enforced in a foreign state or in other words how would a party enforce its award in its own domestic country. Such matter is what is being dealt by International Arbitration. New York convention[7] and Geneva convention are two such conventions which are considered as the base for enforcement of such awards. Almost every country is a signatory to the new York convention. If we carefully analyse section 44 to 52 of the Arbitration act, 2015 it provides for the provisions for enforcement of such foreign awards in India under the new York convention whereas section 53-60[8] deals with the enforcement of such award under the

7http://www.newyorkconvention.org/

8https://www.lawnotes.in/Arbitration_and_Conciliation_Act,_1996

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Geneva convention. The only pre requisite for such enforcement except for being a signatory to the convention is that the arbitral award shall be made in the territory of another contracting state which is a reciprocating territory and such shall be notified by the central government. Since we are focusing so much on the term “Foreign award” let us discuss what actually this term means. The term 'foreign award' came up for discussion before the Punjab and Haryana High Court in **Lachman Das Sat Lai and another v. Parmeshri Dass and another.**[9]

The firm Parmeshri Das Mehra & Sons (respondents) and the firm Lochman Das Sat Lai (appellants) carried on business at Amritsar. The appellant firm agreed to purchase ten bales of American cloth from the respondent firm on certain terms. The contract

contained an arbitration clause reading :

"Any dispute or claim of whatsoever nature relating to or arising out of this contract shall be referred to arbitration of two European Merchants engaged in the piece—goods trade at Karachi, one to be appointed by each party and in accordance with the provisions of the Indian Arbitration Act No. X of 1940".

A dispute arose between the parties regarding the quality and quantity of the goods sent to the purchasers. An arbitrator was appointed by the respondent firm, but the appellants

failed to appoint any. The sole arbitrator made an award in favour of the respondents. It was this award which the respondents sought to enforce Under the provisions of the Indian Arbitration Act of 1940 The contention of the appellants was that the award in question was a foreign award and hence the Indian Arbitration Act of 1940 had no

application. The Court upheld this argument, as after partition of India in 1947 Karachi became part of Pakistan and Amritsar became part of India. Consequently, the award was considered as a foreign award. In short where an agreement for arbitration was entered into by parties in a state, which was later bifurcated into two sovereign entities, and the

award was rendered in one of those newly constituted states, the award would be treated as a foreign award in the other sovereign part. But the converse situation arising as a result of merger of two independent states into one state requires serious consideration, as no issue involving such a situation has arisen so far.

Are Arbitration decisions/awards binding?

This is a questions which often remains unclear and unanswered. First of all it must be made clear that the arbitration agreements are of two types (A) Binding arbitration agreements (B) Non binding arbitration agreements. In the former kind of agreements the decision is final and in very limited circumstances parties may go to court in case some kind of fraud or negligence is involved but other than that such agreements are binding. In the latter kind of agreements it is upto the parties. They may reject the decision and approach the courts for

9A.I.R. 1958 Pun. 258.

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settlement of their dispute but it is worth noting here that even in non binding arbitration agreements there is a time clause/ limitation clause and thus if the parties do not turn to the court in a stipulated time, such award becomes binding. Thus it is made clear that the arbitration agreements can be both binding and non binding. Parties may aproach the court in both the cases subject to the grounds on which it decides to approach the court. It will be a valid argument that what is the use of such non binding arbitration agreements when one can simply reject the decision and approach the court but it is how it is. Arbitration agreements are made solely to lighten the pressure of the courts and to provide a faster way of adjudication but the ultimate goal has always been to provide justice and therefore if there is even 1% chance of securing justice by opting through the lengthy process of courts then it must be kept as an option. Thus if we actually analyse the concept of non binding arbitration agreements than it is rather good to have an option and this is the sole reason such non binding arbitration agreements are listed under the advantages of arbitration above.

Are there any disadvantages of this upcoming pillar of legal system?

Just like a coin always has two sides, Arbitration as a concept also is not subject to pros only. There can never be pros without some cons and as such arbitration also has some disadvantages. Whether such cons outweigh its pros is a separate argument which must be analysed too. For now lets stick with the disadvantages which are listed below -

- Cost involved - The number one disadvantage of arbitration which may come as a surprise is the cost factor. It is not always necessary that the arbitration agreement may reduce the cost involved in the proceedings. In non binding arbitration agreements the parties may opt to the court proceedings which will ultimately add to the overall litigation cost

- Time involved – Another surprising disadvantage which is involved in the arbitration proceedings is that the time involved may not be justified. It can be seen in the cases where such arbitration agreements are between companies in different states and even after the grant of the award the enforcement of such award may make such proceedings lengthy

- Difficult to appeal – The purpose of arbitration is to reduce the pressure on the courts thus the option of appeal is kept minimal and limited subject to some certain grounds but this might act as a disadvantage only as the ultimate purpose of any legal proceeding is to provide justice and such limitation may act as a deterrent to it.

- No fixed standard - Another disadvantage of the arbitration proceedings is that there is no fixed standard or fixed qualification for the appointment of the arbitrator. In such a scenario it is very difficult to judge the competency of the concerned arbitrator and as such the fairness of the trial too.

- Complexity – Arbitration is still a new concept and many amendments and changes are needed to be put forward to consider it as a perfect alternative to the normal litigation involved in courts.

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Conclusion

No doubt that with the population of almost 132 crores it is practically impossible for the courts to handle all the matters timely and efficiently. The workload is exceeding the workforce. As a result people are losing faith in the judiciary. Because of such reasons a timely and efficiently measure such as arbitration is a must for a country like ours. No doubt it also has some serious disadvantages but if we sit idle and do nothing and refuse to try upon such new measures then the result would be devastating. Companies all over the globe are including arbitration agreements in their contracts so as to avoid lengthy and costly litigation process. It is still a new concept with much amendments yet to come but if treated and understood properly such a concept will undoubtedly help in restoring the peoples faith in the judicial system and timely resolving the disputes. It comes as a surprise as to how quickly India has opted for such concept of arbitration and it would not be wrong to suggest that there may come a time where India may prove to be a hub of such arbitration. The number of people interested in this concept and with the increasing interest toward this field one thing is clear that with certain amendments and changes or in short with fixation of certain loopholes the advantages of such concept is unmatchable and it is not a matter of debate that it is being considered as a new and upcoming pillar of the judicial system of our country.