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INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA: AN OVER VIEW

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Abstract

The beginning of arbitration may be traced back to the ancient system of the village panchayats prevalent in ancient India. The decisions of Panch while meeting collectively as panchayat commanded great respect because of the general belief that they were embodied with the voice of god and had to be accepted and obeyed unquestionably. In course of time this model changed though panch parmeshwar to radical change with the change in society and civilization.

Arbitration in India during the 20th Century was governed by the Indian Arbitration Act,1859 with limited application and the Second Schedule to the Code of Civil Procedure. Thereafter, it was substituted by the Arbitration Act, 1940. Section 8 of that Act convened power on the Court to appoint an arbitrator application made in that behalf and decline 20 conferred a wider on a jurisdiction on the Court for directing the filing of the arbitration agreements and the appointmentof an arbitrator. Section 21 conversed power on the Court in a pending suit, on the agreement of parties, to mention the difference between them for arbitration in terms of the Act of 1940. The Act also Provided for the filing of the award in Court, to mark the award a rule of Court, and rightto have the award set aside on the grounds stated in the Act and for an appeal against the decisionon such a motion. The Arbitration Act, 1940 was substituted by the arbitration and Conciliation Act, 1996 which, by benefit of its Section 85, repealed the earlier Act of 1940. The Act of 1996 was presented in view of the rising complexities of modern commercial transactions in the rise of globalisation of economy which required an active redressal mechanism for speedy settlement of domestic as well as international commercial disagreements so as to confirm uninterrupted flow of trade and commerce. This has been likely through measures such as conciliation, mediation or arbitration which are well-thought-out as relatively less expensive and speedy mechanism as paralleled with the court proceedings which are expensive, tardy and involve a complex and unwieldy procedure.

The Arbitration and Conciliation Act, 1996 was intended to cover international and commercial arbitrations and eagerly conciliations as also domestic arbitrations and conciliations. It imagines the making of an arbitral procedure which is just, efficient and accomplished of meeting the essentials of the globalised economy. It required to combine and the amend law linking to domesticarbitrations and international commercial arbitration as likewise to place down the law connectingto conciliation and matters linked therewith or related thereto.

Key words : globalised economy, arbitration, cancelation, international

Arbitration Defined

Arbitration' for the resolution of disputes may be defined as a "mechanism which takes place usually pursuant to an agreement between two or more parties, under which the take decision to be taken under which parties agree to between the arbitrator according to law or if so agreed, otherconsideration after a fair hearing such decision being enforceable by law ."From the above definition, it may be incidental that arbitration is a process -ties through arbitration tribunal appointed Court the request of a party. Exactly speaking it's an alternative to litigation. In terms ofSection I (a) of the Arbitration means any arbitration whether or not administered by permanent arbitral institution. The arbitration law, consequently, seeks to inspire parties to settle their disputes and differences confidentially either by mutual concessions third person. The Court litigations being expensive and law needs it to be resorted to sparingly.

In arbitration, two or more parties yield to their dispute to the judgment of a third person in a manner he acts as an arbitrator who chooses in a judicial manner. The spirit of arbitration withoutsupport or intervention of the Court settlement of the dispute by a tribunal of the private choice ofthe parties.

Difference between Arbitration & Valuation

Arbitration varies from valuation in the logic that in the former the existence of a dispute Or difference between the parties is a vital element, but of valuation prevents differences in the propersense of the term. Thus valuation is in fact an appraisement or proximation of the value of propertyto be sold or purchased. It is usually seen that the seller wants to get the uppermost price of the property which he is selling and the purchaser to pay the lowest and consequently they seek help of the valuer to know the real value property, thus he really prevents differences but by no give, settles the real value of then Values are experts in their Own field e.g. an architect assesses the condition of building and its cost, an auditor mechanism out the value of company assets or shareholding etc.

Difference between Arbitration & Reference

It is true that in most cases, specialists like engineers, architecture and accountants lawyers etc. Asbetween the parties referred to arbitration. In such cases the differences expert. But every referencemade to an expert is not a reference for arbitration. Pointing out the difference between arbitrationand reference, the Supreme Court in Food Corporation of India v. Sreekanth Transport, observed:"Arbitration agreement is to be distinguished from agreement for reference by an engineer or expert. Contracts may contain a clause that on certain questions the decision of an engineer, architect or an expert shall be final. Then given by the expert is in such cases is not an award. Therefore, Such an expert is under no obligation to receive evidence or submissions and is entitledto arrive at his decision solely upon he basis of his own expertise. The procedure involved is not an arbitration as he only gives his opinion on the reference made to him. "Where a clause in the agreement providing for settlement of questions relating to specifications, design, quality and workmanship and other technical features by an expert officer of one of the parties held, it was notan arbitration clause but only an agreement officer of one of for reference.

Similarly, in the case of Registrar, Agricultural Science v. G. G Hosamath provided that the decision of the Estate Officer shall be ultimate and binding on all the parties, upon all the matters,held that the clause did not anticipate arbitration but only a reference. It must, however, be statedthat being of a dispute is sine qua non for both, arbitration as well as reference but the difference among the two lies in the fact that in the case of former an arbitrator settles the dispute whereas inof latter, the matter is mentioned to an expert as agreed to between the parties By reading Section2 (1)(6) and Section 7 together it may be means first, there would be an arbitration agreement in being and next there should be some dispute between the parties so that a reference may be made the arbitral tribunal. A dispute cannot be entertained by the Arbitral Tribunal without reference being made for its resolution.

Types of Arbitration:

1 Statutory Arbitration:

Where the explanation for settlement of disputes is statutorily provided through the manner of arbitration, the parties concerned have necessarily to resort to arbitration and there is no alternativefor the parties. For example, Section 43 (c) of the Indian Trusts Act, 1882 provides for arbitrationas a manner of settlement of dispute relating to transactions concerning Trusts. Similarly, Section5 of the Delhi Transport Law(Amendment) Act, 1971 and Sections 24, 31, 32 of the Defence of India Act, 1971provided that arbitration shall be resorted to for the solution of disputes between employees and the management concerning their service matters.

2. Contractual Arbitration:

This type of arbitration is also called consensual arbitration because of the detail that it is based onmutual consent of the parties for settlement of their disputes. The parties generally agree to inset an arbitration clause in the contract itself that in case of any dispute involving to transaction arisingbetween them, it shall be resolved through arbitration. The name of arbitrator(s) or institution or expert body to be appointed are equally decided before hand in this type of arbitration. Thus an arbitration clause is to be originate in the main contract itself in case of a consensual arbitration.

3. Ad hoc Arbitration

Ad hoc arbitration refers to an arbitration where the procedure is either agreed upon by the partiesor in the absence of an agreement the procedure is laid down by the arbitral tribunal. Thus it is anarbitration agreed to and decided by the parties themselves without seeking the help of any arbitralAd hoc arbitration, if the parties are not able to nominate institution. In arbitrator/arbitrators by consent, the appointment of arbitrator is made by the Chief Justice of a High Court (in case of domestic arbitration) and by the Supreme Court (in case of international arbitration) or their designate. The fees to be paid to the arbitrator is decided to by the parties and the arbitrator concerned

4. Institutional Arbitration

In an institutional arbitration it may stipulate in the arbitration agreement that in case of dispute ordifferences arising between them, they will be mentioned to a particular institution such as (ICA)International Chamber of Commerce (IC),. Federation of Indian or Chamber of Commerce & Industry (FICC); World Intellectual Property Organisation (WIPO) have framed their own rules of etc. All these institution arbitration which would be applicable to arbitral proceedings conductedby these institutions. The parties have the choice to pursue recourse to Ad-hoc arbitration or institutional arbitration depending on their choice and convenience.

5. Domestic Arbitration

Domestic arbitration takes place in India when the arbitration proceedings, the subject substance of the contract and the merits of the dispute are all ruled by the Indian Law; or when the cause of action for the dispute rises wholly in India or where the parties are then subject to Indian Jurisdiction.

6. International Arbitration

International arbitration can take place whichever in India or outside India in cases where there arerequirements of foreign origin relating to the parties or the subject-matter of the dispute. The lawappropriate may be Indian law or foreign law depending on the agreement between parties in this regard. The definition of International Arbitration is given in Section 2 (1) () of the Arbitration andConciliation Act, 1996.

7. foreign arbitration

Foreign arbitration is an arbitration which is led in a place outside India and the resulting award issought to be enforced as a foreign award.

Historical Back drop

Similar most Indian laws, the law relating to arbitration in India is also based on the English Arbitration Law. The English merchants and traders mentioned their trade and commercial who were particularly selected for the purpose. Originally, the Arbitration Act of 1697 was ratified in England to resolve the disputes relating to personal chattels or personal wrongs or real estate of the disputant merchants and traders. Besides, the Common Law Procedure Act, 1854 also limitedsome provisions relating to arbitration with a view to creation the award more binding upon the parties and certifying its legal enforcement. These statutes were subsequently replaced by the Arbitration Act, 1889which revoked all the earlier English enactments relating to arbitration.

In India, the leading statutory enactment on arbitration law was the Indian Arbitration Act, 1899, which was modeled on the English Arbitration Law, 1889. Previous to this enactment, the Bengal Regulation of 1772 provided that the parties to a dispute relating to accounts etc. shall yield to their cause to arbitration, the award of which shall become a decree of the court. Further changes were complete in the arbitration law by the Regulations of 1781 and 1782 which provided that anarbitration award could be set side ways on the proof of gross corruption or partiality on such declarations being made by at minimum two trust worthy witnesses on oath. The arbitrators wereto be chosen by the parties of their own choice and their by decision was last and binding on the parties at minimum two trustworthy witnesses on oath. The arbitrators were to be chosen by exceptin case of partiality or misbehavior on the part of arbitrators. Regulation of 1787 empowered the court to refer disputed matters to arbitration with the consent of the parties.

The working part of the arbitration law was made more real by the Bengal Regulation,1793 whichprovided that the Court could refer matters and suits relating to accounts partnership debts, non- performance of contracts etc. to arbitration where the value of suit did not surpass two hundred sikkas (i.e., rupees). The Regulation also laid down the procedure to be followed in showing arbitration proceedings. The provisions relating to arbitration proceedings well-ordered in the Regulation of 1793 were extended to the territory of Banaras by the Regulation of 1795. These were made further appropriate to by the Regulation of 1803 the Province of oadh.

The Governments of Madras and Bombay also talked certain powers on the Panchayats to settle disputes by arbitration by the Madras Regulation of 1816 and Bombay Regulation of 1827 respectively.

Consequent to the enactment of the Code of Civil Procedure the 1859 provisions unfolding to arbitration were incorporated in Chapter VI of the Code .However, these were not appropriate to the Non-Regulation Provinces and the Presidency Small Cause Courts as also the Supreme Courtof Calcutta, Madras and Bombay. The Code of Civil Procedure 1859 was subsequently cancelledand replaced by the Act of 1882 which was further replaced by the Code of Civil Procedure, 1908.this Code limited elaborate provisions relating to arbitration in Section 89, Section 104Second Schedule of the Code of Civil Procedure, 1908. The Indian Arbitration Act,1899. however, sustained to be applied only to matters which were not before a court of law for adjudication. It was in 1940 that the Indian law on arbitration was combined and redrafted in the form of Arbitration Act, 1940 on the pattern of the English Arbitration Act, 1934. While the English Arbitration Act, 1934 was subsequently adapted by the Act of 1950 followed by the Arbitration Act of 1979, the Indian Arbitration Act, 1940continued in force until it was replaced by the new Arbitration and Conciliation Act,1996.

The globalisation of trade and commerce and the need for real implementation of economic reforms during the preceding decade necessitated re-drafting of the Indian Arbitration Act of 1940with a view to safeguarding moth and prompt settlement of domestic as well as international commercial disputes. The Law Commission of India, in its 76th Report in November,1978 had already optional the need for updating the Arbitration Act of 1940 to meet the new challenges of the current developing economy of the country.

Besides, several other representative bodies or trade and industry and legal experts also future drastic changes in the existing arbitration law which suffered from several gapsand defects. As a result of these demands, the Arbitration and Conciliation Bill, 1996 was promulgated ulgated by the President to meet the needs of business community for speedy of commercial disputes. Since the Parliament could not pass the Bill inside the lement of commercial dis.Setlen stipulated lated time, the Ordinance had to be re-promulgated twice up until it was finally passed as the Arbitrationand Conciliation Act, 1996 which established the assent of the President of India on 16th August,1996. The Act has been brought into effect from 25thlanuary, 1996, the day the pertinentOrdinance was passed. It may be stated that arbitration which had lost its purity as an alternative dispute resolution system was gradually being relieved by newer techniques such as conciliation,mediation and negotiation which have now been statutorily recognised by the Arbitration and Conciliation Act of 1996 (Act 26 of 1996).

The working of Arbitration Act of 1996 over the years has exposed that it does not sufficiently fulfil the supplies of domestic as well as international arbitrations in certain specific areas.

International Perspective

It may further be pointed out that efforts were already being made by the United Nations to workout a complete uniform Model Arbitration Law at the International level which could be consistently adopted by the member countries with appropriate modifications keeping in view theirdomestic needs and national laws. For this drive, the Model Law on International Commercial Arbitration was accepted in the United Nations Commission on International Trade Law (hereinafter referred to as UNCTTRAL) on 21st June, 1985 in its18th Annual Session. The General Assembly ,in its Resolution dated 11th December, 1985 optional that all States should adopt UNCITRAL Model Law on International arbitration. India, being a member-country, has adoptedthe UNCITRAL commercial arbifodel Law by enacting the Arbitration 'and Conciliation Act, 1996with a view to Moahringing about uniformity in arbitration procedures and meet the needs of International commercial arbitration in its commercial transactions with foreign countries. With the growing role of international trade and developing economy, the threat of commercial disputes has als0 grown substantially. Therefore, the importance of international dispute resolution mechanism including arbitration as a means of resolving trade disputes has expected greater importance in recent decades. The recent drifts in international commercial arbitration which is built on UNCITRAL Model Law clearly indicate that there has been greater emphasis on:

() Greater party autonomy and non-intervention of Court in the arbitral process;

(2) Preference for institutional arbitration instead of ad hoc arbitration;

(3) Recourse to arbitral process instead of Court litigation. Enactment.

Law on International Commercial Arbitration .lies in the fact that with the liberalization and globalisation on Indian economy in current past more and more non-resident Indians(NRIs) and Foreign Investment Institutions are entering the Indian market which necessitated re-drafting of the Arbitration Act or 1940 to be made more responsive to the change in Indian economy.

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