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"THE EVOLUTION OF ARBITRATION: ANALYSING GLOBAL AGENCIES AND THEIR IMPACT ON DISPUTE RESOLUTION"

AUTHORED BY - ARNAV AVASTHY & PALAK AHUJA

Introduction

Richard Cobden rightly quoted *"At all events, arbitration is more rational, just and humane than the resort to the sword".* The word arbitration has been derived from the Latin word arbitrary which means to judge. In common parlance arbitration basically means to resolve the disputes by appointing a third neutral party whose decisions will be binding on both the parties. In the ongoing scenarios where the world is expanding post-hastily, legal issues are also rising at an indistinguishable rate. Therefore, their arise a need for imperative and swift dispute resolution mechanism for the interest of justice and hence the concept of Arbitration was introduced.

The history of arbitration can be dated back to ancient era where the Romans, Greeks and Egyptians used this method prior to the implementation of the court system to resolve the issues. Philip of Macedon in the ancient scriptures is regarded as the father of arbitration as he used it to resolve the territorial disputes with the Greek States by using arbitration.

In India the inference for arbitration can be drawn from the "Brihadaranyaka Upanishad" which elucidated three types of popular court namely "Puga" which were regarded as the local courts followed by "Srenis" which referred to people who are engaged in the same business or profession and lastly the "Kulas", members who are centric with social matters of a particular community.

In the early 19th century when India became a British colony Indian Arbitration Act,1899 was introduced on the foundation of English Arbitration Act, 1889 which was only enforceable in the following precedencies namely Bombay, Calcutta and Madras. One of major highlights of this act was that it specified the arbitrator's name in the agreement moreover, arbitrator could be a sitting judge back then. However, one of the major drawbacks of this act was it was bulky,

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complex to understand hence The Arbitration Act, 1940 was implemented which mitigated all the issues of the Indian Arbitration Act, 1889.

Currently, UNCITRAL Model of law on International Commercial Arbitration which was implemented by the United Nations is deemed to have paramount importance as it bestows template for the states to standardize their arbitration laws. Various nations have induced arbitration either wholly or partially in their domestic legislation. Numerous institutions like the International Chamber of Commerce (ICC) and London Court of International Arbitration (LCIA) have laid down rules for administering the conduct of arbitration.

Advantages and Disadvantages of Arbitration

The argument whether arbitration is advantageous or not has been a matter of discussion since decades as for many litigations is still a preferred option. Following are the numerous advantages and disadvantages of arbitration.

1. Advantages of Arbitration:

1.1 Productive and Versatile: Arbitration is treated as productive and versatile as the disputes are resolved at a much faster pace. Whereas, in trials the matter can take many years to reach to a plausible conclusion. Furthermore, trials are scheduled according to the calendar of the courts which sometimes can take up to more than couple of months due to the backlog of numerous cases. Whereas, arbitration can be conducted at the convenience of both the parties and the arbitrator.

1.2 Diminished Complexities: Arbitration in comparison to traditional litigation is relatively less complexed as the litigation requires intense paper trails, long and tedious motion of hearing. The rules and regulation used in the regular course are not strictly applied which makes it easier to conduct arbitration.

1.3 Privacy: In contrast to litigation where all the proceedings take place openly in the courtroom any individual who is concerned with the case or not can attend it. However, in arbitration the proceedings take place in private which is attend by the parties and the arbitrator duly appointed by the both the parties. Therefore, in arbitration the privacy maintained is relatively on the higher side in comparison to both the parties.

1.4 Even-handedness: Since the arbitration takes place between the two parties, they have the right to mutually decide an arbitrator which ensures that the decision is

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unbiased and binding on both the parties.

1.5 Cost-effectiveness: In comparison to litigation arbitration is regarded as cost-effective because the legal counsel fees and other expenditures that are incurred in litigation are automatically reduced further, since the time taken in the course of litigation is relatively less in comparison to the litigation procedure. Moreover, cost of appointing an arbitrator is relatively insignificant in comparison to that of a legal counsel fee.

1.6 Conclusiveness: In arbitration since the arbitrator is appointed by the mutually the decision of the arbitrator is conclusive and binding on both the parties which limits and grounds for further appeal which not the case in litigation since any decision given by the lower court can be duly appealed in the higher court of hierarchy.

2. Disadvantages of Arbitration

2.1 Dubious Impartiality: In certain agreements the clause of arbitration is implacable which means that the parties do not possess the leverage and pliability to select an arbitrator by mutual consent. Hence, one part being in the dominant state makes it difficult for the other party to meet the ends of justice and hence litigation would be preferred over arbitration.

2.2 Prejudice of the arbitrator: The procedure of selecting an arbitrator is not always objective. Numerous instances are there where the arbitrator might not disclose any prior self-interest with the other party which in return makes the arbitrator prejudice to one party and hence, he is unable to deliver or meet the end of justice freely.

2.3 Disparity in power: Many corporates across the world prefer to induce the arbitration clause in such a way which leads to centricity of power with them. Moreover, employee at different levels of the management might not be very well worse with the functioning of the arbitration clause. Lack of awareness of the actual functioning of the arbitration clause makes the power of decision making vested in their hands.

2.4 Elimination of judge and judiciary: In arbitration the concept of judge and judiciary is eliminated and the power to adjudicate the matter is vested with an arbitrator. In case of biasness of the arbitrator the matter cannot be concluded in an systematic and appropriate way.

2.5 Expertise of the Subject matter: In certain circumstance where the technicality of the matter is complex an arbitrator with that particular technical knowledge is

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required. An individual who does not possess the technical expertise might not be able to adjudicates the matter in an appropriate way.

2.6 Capriciousness: One of the major disadvantages of arbitration is that is does not follow the rules of procedure and evidence that are necessarily involved in the courtroom trial. For instance, some evidence may not be considered by a judge during the trial but the same if presented in front of the arbitrator may change the course of proceedings.

[1]International Agencies involved actively in the field of Arbitration

1. **International Chamber of Commerce:** Established in Paris in 1923, it is regarded as the leading commercial arbitration establishment. It acts as an administrator itself and not an arbitrator. It is majorly dependant on its committee and secretariat in making arbitrator appointment. However, the rules laid down by ICC is often regarded costly and incommodious.
2. **London Court of International Arbitration:** Established in 1892 it is deemed to be the preeminent institution in the field of commercial arbitration. In the recent decades it has gained a significant position to overcome the perspective of an English institution. One of the significant highlights of this institution is that it neither provide any procedure for reference nor does it provide review to the arbitral awards.
3. **American Arbitration Association and International Centre for Dispute Resolution:** Founded in 1926 it is based out of New York. Regarded as one of the leading arbitration institution it handles the majority of arbitration disputes in the world.
4. **Permanent Court of Arbitration:** Founded in 1899 largely focuses on it emphasize on state like entities.
5. **Vienna International Arbitration Centre:** Founded in 1975 it conducts arbitration as per the rules set-out in VIAC. One of the major requirement of this institution is that one of the parties shall be of non-Austrian origin.
6. **Singapore International Arbitration Centre:** Founded in 1991 it primarily dealt in issues of construction, shipping and banking. With increasing demand and importance as an international finance centre it is dealing with wide range of disputes

[1] International Arbitration Institutions / Different Forums, available at https://www.internationalarbitration.in/areas/forums.html (Last Visited on 12-06-2024)

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like energy, financial, joint ventures, sales and other subjects.

Arbitration and Conciliation Act, 1996

Arbitration and Conciliation Act was enacted in the year 1996 which focused on facilitating structure for successful resolution of disputes, by reducing the interference of judiciary and providing autonomy. The objectives of enactment of this act were:

- Synchronization of domestic and international arbitration
- Laying down the guidelines and procedures for conduct of the arbitration successfully.
- Specifies the guidelines in relation to appointment of the arbitrators under Chapter III, Section 11 of the act
- Also, helps in enforcement of foreign arbitral awards.
- **Provisions of Part I (Section 2 – 43)** deals with the award granted within the provisions of this act shall be granted as a domestic arbitral award
- **Provisions of Part II (Section 44 – 60)** deals with the provisions related to enforceability of foreign awards.
- **Provisions of Part III (Section 61 -81)** specifies the provisions of Conciliation
- **Provisions of Part IV (Section 82 -86)** is related to the supplementary provisions of the act.

Conclusion

The concept of arbitration can be dated back to ancient times. However, with the evolution of the society new rules were laid down for swift redressal of disputes. Still many people do not possess much knowledge about the technicalities and functions of the various provisions of the arbitration. Following are the ways by which people can be made aware about the provisions of arbitration.

- **Workshops and Seminars:** Organization of workshops and seminars for people at frequent intervals to explain the concepts and provisions of arbitration and how it is distinctive from the traditional approach of litigation.
- **Resource Facilitation:** Creation of interactive content and posting them on social media like YouTube and Instagram can surely lead to enhancement of knowledge among the layman.
- **Media:** Media is regarded as the fourth pillar of our Indian Constitution. It can surely

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play an integral part in spreading awareness and why more and more people should go for arbitration instead of traditional litigation practices.

- **Inclusion in the Curriculum:** Basic framework shall be laid down in the curriculum of the students so that they get aware about this trench of legal mechanism.
- **Industry Stakeholders:** Stakeholders and policy makers from the industry shall be involved for association. Guest lectures shall be held frequently as their valuable feedback can certainly create an impact.