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ARBITRATION IN FRANCHISE SYSTEM: **APPLIED ARBITRATION**

AUTHORED BY - PROF. DEEP KAPADIA

Abstract

Franchise business is booming not only in India, but across globe. It is evident fact that \$55000 crore businesses are income of franchisee in India, and that too only franchisee contractual income, and hardly royalty income is caught in this figure.

It is necessary to harness such rapidly growing concept and many countries have even formed law and soon India will be reaching the lane of franchisee law, but currently it works on commercial law system. It's mandate to have arbitration clause in Franchisee contract. But, does arbitration rules suffice when the dispute rises. Recently Singapore high court was pro-arbitration in franchisee contracts

This papers aims in two directions:

1. Arbitration in Franchisees, for which we analyses
 1. What is franchisee
 2. Franchisee differing from commercial contracts and process
 3. Franchisee Qualifying for Arbitration- Need of One more Industry specific Rules
 4. Types of disputes in franchisee
 5. Arbitration backfires to franchisee, in reference to Brazilian Law

2. Applied Arbitration-

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i.e. we cannot remove or change the nature of substance, as it's nature is soul.

So, we need to understand that every industry has it's own nature, and there dispute resolution must depend on such industry nature.

This aspect is trying to create a different view. It suggests that by making the arbitration industry specific, it will pile up the rules and law; complexify the system and reduce the scope of practioners. So, the arbitration instead of moving towards industry specific arbitration must turn

itself to “Applied arbitration”.

Applied Arbitration means that common law of arbitration will remain same, with certain advances to accommodate ‘various types of industry’, and applied part means that arbitration will consider expert aspect of the industry.

IT may seem it is old wine in new bottle, but it is existential approach to law, bring the law to simplified, common and uniform process catering varieties of industry.

This paper aims to clarify the clouds of industry specific law of Franchisee considering Indian conditions, Singapore, Brazil and other laws working on various disputes on franchisees.

Key words- Franchisee agreement and Arbitration; Arbitration analysis in Franchisee; franchise law; Applied Arbitration law, disputes in franchisee and way to solve it

Best progress was made when every contract was referred to arbitration before court conflicts. The process which is pocket friendly, reliving and quick to heal.

Arbitration is one of the finest device law for fastest resolving disputes which is based on natural justice. And that is why it is most adored aspect of commercial dispute resolution.

This paper is aiming to apply the arbitration in ‘Franchisee system’. Franchisee system is most blooming system of business, it is said in 2021 report of ‘Marketing White book’ only in India it covers official transaction \$ 55,000 crore. This figure is only for buying and selling franchisee only. Also, the global reports state that in 2023 it is growing; out of every 7 business 1 is converting into franchisee system. It has employed approximately 19 million people across the globe. And made numerous people earn opportunity through ‘experience way of businesses. Today only 30 countries have adopted the franchisee laws; India is also in the race of applying the act but yet in India and other countries Franchisee is considered just as an agreement. But, fact remains that franchisee is wider concept than agreement/ contract, it involve multiple law and it need to be handle very delicately and different way, and hence this paper come to rescue.

It is necessary to harness such rapidly growing concept and many countries have even formed law and soon India will be reaching the lane of franchisee law, but currently it works on commercial

law system; though certain laws like Finance Act 1999, Income tax Act etc. do use the term franchisee to understand the tax liability or financial liability over the business. It's mandate to have arbitration clause in Franchisee contract. But, does arbitration rules suffice when the dispute rises. Recently Singapore high court was pro-arbitration in franchisee contracts¹

My attempt is very simple and works on the notion of existentialism and Indian scripture and saying that needed thought in today's time. This paper will be leading to show 2 wide angle answers:

a) Arbitration application in Franchisee system

b) Instead of using Industry Specific as term, we need to replace/say 'Applied arbitration'

To begin with first part of applying the arbitration in franchisee system is divided in 5 parts viz.:

1. What is franchisee
2. Franchisee differing from commercial contracts and process
3. Franchisee Qualifying for Arbitration- Need of One more Industry specific Rules
4. Types of disputes in franchisee
5. Arbitration backfires to franchisee, in reference to Brazilian Law

Part I- Applying Arbitration in Franchisee

1. What is Franchise?

Before we enter in the core part of arbitration to be applied in franchisee we need to understand what exactly is this franchise. Franchise term is not new in recent trends; we are seeing across the globe many franchise like Dominoes, Mac Donald etc.

Franchisee definition in India can be seen in the Finance act, 1999² Sec. 32 mentions the franchises and its tax liability and tries to define the states, a "franchise" is an agreement that allows someone to work with a franchisor to sell or make stuff, offer services, or run a business.³

This definition seems good for taxation wherein Act is mentioning the tax to be paid to state and not to center in certain aspect. We can also quote the definition of a franchise according to the Brazilian Franchise Law, Article 1, BFL, which states, "a franchise is a business model in which the franchisor authorizes the franchisee to use the franchisor's Intellectual Property assets,

¹ www.cidra.org; <https://arbitrationblog.kluwerarbitration.com/2022/12/06/>

² Vakilsearch.com; The finance Act, 1999 Sec. 32, bare act, incometax.gov.in

³ Ibid

including, but not limited to, the right of production of, or the right to produce or distribute, in whole or in part, products or services, and the right to use, by direct or indirect means, the methods and systems of implementing and managing the business or operating system developed by, or under the control of, the franchisor.”⁴

For me Franchisee can be defined as, “Commercial relation between two or more parties termed as franchisor and franchisee, wherein the experienced or brand party is granting the permission to use the Intellectual property, product/ services, pattern of the displays and interior, operation model/s, apps, website, internet and offline marketing strategy and designs, any other adoptable features, with sharing same unique selling points and also guide and train the franchisee (buying) party keeping certain trade secrets and control in franchisor’s management, and gain one time license granting fees and regular base decided share as royalty, giving option to maintain common or different bank account, giving special rights either on geographical marking or business competition marking”.

2. Franchisee is different from Commercial business, licensing and process.

Before entering in Arbitration for franchisee we also need to understand that why and how franchisee systems differ from other commercial processes or licensing processes, as if then only we can relate that we really need the arbitration process. If Franchisee is same as commercial business then we do not need to specially mention franchise as ‘one more industry’ and create new industry specific arbitration. So, let’s distinguish between Franchisee with commercial business and licensing process.

Difference between Franchisee and commercial nature of business:

1. Franchisee business is between franchisor and franchisee, and what is given is Franchise, while commercial is between partners, directors, companies, associate or two persons may be for one or more transaction.
2. Franchisee works on **one time grant fees and regular royalty fees** or share, while commercial are transaction value like purchase value or profit and loss shares.
3. In franchise, the franchisee is de facto owner of the business and franchisor is de jure owner of the business, while in commercial all the parties are de-facto as well as de-jure.
4. Franchisor is generally **supervising** or controlling the business of franchise; in commercial such controls are divided between both the parties.

⁴ Iclg.com; Brazilian Franchise Law, Law N° 13,966, of December 26th, 2019, published on lawsofbrazil.com

5. In franchisee each time the case is, it works on other person money i.e. on franchisee payments and investment, while commercial it is not always the case there may be investor or sleeping partner but it in remaining cases it is always shared by the parties.
6. Franchisee is just involved in giving the rights of IPR, services/ product. Operation systems and such other things including training and supports, in commercial it is both the parties are involved and function together.
7. In franchise system risk is always to the franchisee buyer and not to the franchisor, but in commercial risk is divided.
8. Very important aspect franchisee agreements are **adhesion contract** though the function is of franchisee. In other words all the terms are given by the franchisor and it must be accepted in TOTO. Also, the terms are of franchisor but it has to be followed and executed by the franchisee. Whereas in commercial both parties have option to go on mutual terms.
9. As China is says franchisee is **one by two** law i.e. develop and run one successful and others follow your path by adopting your branch by their own money. But, commercial can be even new start up and always by mutual consents.
10. Franchisee involve 14 laws to grant franchisee viz. Competition act, Consumer Act, Banking act, IPR act, NDA, Arbitration law, taxation law, transfer of property law, labour laws, company laws, Information technology laws, Licensing, Foreign exchange management laws and Bankruptcy law

Difference between Franchisee and licensing:

1. Licensing is granting the right to use the product or service for some payments or any other considerations, while franchise is granting right for entire business in geographical limits and not just product or service.
 2. Licensing is granting permission by certain authority or party who has acquired such intellectual or other rights of granting, while franchisee is franchisor who may be proprietor or company has right to not only give permission, rather give entire business ownership of particular territorial area to the franchisee.
 3. In licensing the name of the product or name of the business agency can be different, while in franchisee name of the business, logo and all other component are same in every place.
- This evidently shows that Franchising business is quite apart from any other commercial transactions or procedure, and even it cannot be compared with licensing. So, it lead me to the conclusion that franchisee need a separate attention.

3. Franchisee Qualifying for Arbitration- Need of One more Industry specific Rules

It seems to be fancy title, but its contention are very much standard that can franchisee agreement adopt arbitration proceeding and if yes then will it be considered industry specific and need special rules to administer franchisee dispute resolutions.

Can Franchisee agreement go for arbitration?

The Answer to this question, can be simply deduce from UNICTRAL Model Law which implies that any parties who are capable or in contract of any type written, oral or implied can opt for the arbitration techniques.⁵

Since Franchisee is arising out of the contract.

Franchising agreement qualify for the arbitration.

But, it's not simple as the franchisee agreement is adhesion contract, it rises one more RED CARD that the agreement is designed by franchisor and mostly gaining his betterment and so he can write boldly that in dispute matter party has to go for the arbitration. And it Give a sting

1. It means arbitrator in agreement is as per the franchisor
2. Jurisdiction is as per franchisor
3. Dispute issues are as per the franchisor

Herein Brazilian thinkers like Thiago Marinho Nunes and Gilberto Giusti tries to say that clause of arbitration in Franchisee agreement seems to be '*unnecessary*'.⁶ It is looking like backfire in point number 5 we will discuss this in brief. But here it has simple answer that Franchisee law must strictly adhere to arbitration law, stating that arbitration method must be approached with Unictral model or Countries Arbitration Law, where adhering party has scope to raise the curtain and ask the justice. We must never forget the Basic of arbitration is 'Natural Justice' and not mere temporary solution to dispute.

Finally it seems to conclude on the above to paragraph considering the Rosemar case and it's also a dispute between Amazon (NV) Investment Holdings Inc., against Future Retail Ltd. as franchise agreements are pro-arbitration agreements. And it need special attention.

Need of industry specific Arbitration for franchisee:

Being rooted from Indian philosophy will like to state few aphorisms-

द्रव्याश्वभव नियमादिति

⁵ Law relating to Arbitration and Conciliation in India, 4thh Ed., Dr. N.V. Parajanpe, Central Law Agency, p. 348-49

⁶ Franchising Arbitration in Brazil: What to Expect from the New Franchising Legislation?, arbitrationblog.kluwerarbitration.com, 2020

i.e. every substance (or subject in this matter) nature is revealed by its character, attribute or properties which it belongs.⁷

स्वभवस्यानपायेत्यादननुष्ठानलक्षणमप्रमण्यम्

i.e. we cannot remove or change the nature of substance, as its nature is soul.⁸

One need to understand that every industry has its own nature, and there dispute resolution must depend on such industry nature.

So, do franchisees are special commercial relation, and to tackle its dispute one need to make it industry specific.

Why Industry Specific Rules in Franchisee can be elaborated in following topics:

1. Experienced: An experience arbitrator in the field of franchisee can understand the issues, given in the franchisee. He can understand the scope shown was real misrepresentation or has being error in application and then the solution can be justified.
2. Regulations and License: Number of time we are not aware about some minor difference in the licensing process and again the question raise which cannot be resolve by ordinary law knower, it needs a special vision. For example case of 'packing license' for white labeling and manufacturing.
3. Distinguish between misunderstanding and misrepresentation: party perception changes and the concept of misrepresentation turns to misunderstanding like in case of Pharmacy companies asking for survey and declaring the survey to be unauthentic or improper.
4. Predictability: Industry specific arbitrator not only can understand the dispute, but also understand the future of the product and service. Like in case of Kangen water replica.
5. Quick resolution: main reason to sort to arbitration is cost effective and quick solutions, but non-industry specific arbitrator and rule will take time to understand the crux of the problem and resolving them will be a real issue. Business is there to grown and to educate the other, specially arbitrator from whom we seek solution.
6. Customized Solutions: Industry-specific arbitrators can craft solutions that align with the norms and practices of the franchise industry. They are better positioned to suggest remedies that are relevant and effective for the particular challenges faced by the franchisor and franchisee.

⁷ Nyaya Darshanam Boudhbharati, Nyaya Bhashya, Varansi 1976, 3.1.50

⁸ Samkhya Karika Shloka 1.8

7. **Credibility:** Having arbitrators with industry-specific knowledge adds credibility to the arbitration process. Both parties are more likely to trust the decisions and recommendations of arbitrators who are well-versed in the industry's intricacies.
8. **Specialized Rules:** Majority of the countries are now 'economic choice freedom' countries. So, everyone has right to choose their own means and way of earning. And this give rise to specifically need to device a special law
9. **Confidentiality:** In many cases, industry-specific arbitrators are more likely to understand the sensitive nature of certain information in the franchise sector. This understanding can lead to better protection of confidential business information during the arbitration process.

Rules of Franchisee– World is moving toward specialization, and so do our law on franchisee must move ahead and for that we need following quick amendment.

1. **Arbitrator Qualifications:** Basic qualification for franchisee law can be analyzed as Legal qualification to be arbitrator + Experience in consulting franchisee.
2. **Confidentiality:** need to make this clause stronger as franchisee performances are related to future business also after this problem both parties will continue business and taking their name openly may cause the harm to their business.
3. **Expedited Procedures:** Consider implementing expedited arbitration procedures for smaller disputes that require swift resolution. Franchise-related issues often need to be addressed promptly to prevent disruptions in business operations understand the emergency resolution situation, but always considered the case which states that after winning the case also, that emergency adoption of award may inflict disaster.
4. **Expert Witnesses:** Address the possibility of involving industry experts as witnesses or advisors during the arbitration process. This can enhance the understanding of complex franchise-specific matters.
5. **Industry-Specific Standards:** Allow arbitrators to consider industry-specific standards, guidelines, and practices when making decisions. This can help ensure that rulings are in line with the prevailing norms of the franchise sector.
6. **Industry-Specific Remedies:** Provide arbitrators with the authority to recommend remedies that are commonly used and effective within the franchise industry. This might include options like specific performance, injunctive relief, or compensation mechanisms.
7. **Injunctive Relief:** Consider including provisions for injunctive relief in cases where franchisee actions could lead to irreparable harm to the franchisor's brand or business.

8. **Costs and Fees:** Address how arbitration costs and fees will be allocated between the parties. In some cases, it might be beneficial to establish a fee structure that considers the unique financial dynamics of the franchise industry.
9. **Choice of Jurisdiction:** Determine the applicable law and the venue for arbitration based on the franchising industry's international or regional dynamics.
10. **Appeals:** Specify whether appeals are allowed and under what conditions. Given the desire for finality in arbitration, the rules regarding appeals should be clear and limited

4. Types of disputes in franchisee: resolving plausibility issues

Most interesting aspect about arbitration is finding and framing the disputes and its clause. These topic being vast, so we will limit with few topics; to understand the plausibility of the resolving franchisee dispute by the arbitration.

4. **One Plus two v/s 0 + 4:** This not any numerical problem, rather it is the way wherein many franchisee work. One plus two is the concept introduce in lieu of franchisee in China, according to their strategy if any one , establishes one business successfully can add more shop on other's fund as one plus two concept to which other countries call as franchisee. But, interesting fact is many countries especially what we saw in India people plan the franchisee as 0 plus 4. Let me take an example 'A' company get inspire by the 'Kangen' water alkaline water medical filters they develop 3 types of the replica of filter as Indian made. Take certain financier procure the raw material stuff and build a plan to sell the franchisee of shop type, managerial type, distributor type and over that of service center. This gives a very complicated problem that the sales operation and acquisition proposition are very difficult to estimate due to not a single thing is existing for which sell is occurring, and then if any such franchisee get existence then dispute may arise out of 1) quantum of income which was expected, 2) the process of marketing is inappropriate, 3) POS, acquisition or logistic issue or 4) payment division are inappropriate etc.
5. **Early termination of tenure- due to income confusion:** Many franchisees starts but are not happy with output, just because they fill its insufficient income. Let me take up a case of A burger company of Pune a successful run in Pune, encourage him to give 2 outlets in Mumbai. For developing such franchisee, party takes a short loan. Now on commencement of such shop, the shop earns 11 to 12 lakh rupees per month. But unfortunately 5 to 6 lakh is maintenance, expenses and raw material 3 to 4 lakh is loan repayment and pending amount is getting shared between 2 partners + royalty of the franchisor. Now, the

Franchisee thinks we earn so less. Can this be the real reason of the back-out from contract, and such cases must be handled with care and experience.

6. Early termination to tenure- due to income increase- Another reason to move out prematurely is to realize that by taking the franchisee we are earning less instead that if we are independent we can earn more. We have a supermarket client who is with reputed brand, he first opt out for certain brands like HUL, Cadbury etc. later he learns in other product also we can earn considerable is we do it directly, and so he is offering the other local brand to partner with him and earn profitability.
7. Insufficient Training and hand holding: One of the main purposes of franchisee is getting the professional training and reduction of cash burning issues. But certain franchisee has insufficient knowledge or sources to train the franchisee and its staff. But, it's very subjective question that training is sufficient or hand holding is sufficient or insufficient and such dispute need skilled or experienced person and special understanding to resolve the conflict.
8. Emergency Resolution: When parties approach for arbitration they have acceptance of quick and fair resolution of dispute. In commercial and so do in Franchisee the meter of expenses are always on, so party has to resolve it quickly and party also emphasis on quick closure of arbitration, but this is again a difficult task.

In CVG versus CVH, the High Court took a broad view on the international arbitration law, finding that the definition of 'arbitral tribunal' in section 2(1) would apply to 3rd part of the law in section 27(1). However, the High Court was quick to challenge the enforceability of emergency award, claiming that it breached natural justice because the Respondent couldn't present its case in relation to some of the submissions Claimant made late after the hearing completion. In this case tribunal requested to keep alternate prayer ready, incase of rejection of earlier prayer.⁹

The arbitral award was granted on the basis of the alternative prayer given by the Claimant at the post hearing stage. The High Court considered the parties' submissions and its own contemplation that the decision in the case would be in respect of new cases in which the Claimant dealt with the treatment of the agreement's status and prayer – thus adhering to the requirements of the Act's 'refusal of enforcement' section (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (13).¹⁰

⁹ Ibid

¹⁰ Ibid

9. Marketing, Branding and sales techniques: Another reason to go in franchisee is that franchisee is experienced in marketing, branding or any other such facilities, but thing turns table down. Let me explain you the best way of marketing medicine is doing survey of people around, we also establish one such medical shop and help them to do survey as per the policy of the company, but then company is telling that survey is insufficient and detail are Improper so losses are occurring, which is again like passing the parcel or allegation game, but here dispute handling is true skills as all seems that one party is true,
10. Territory Dispute: Any person who buys franchisee has to be cautious, as wrong selection of place may also cause us worst as decided.
11. Applied Arbitration
Instead of terming and entering into bundles of new pages, we can call it Applied arbitration and same law but with different implications.

5. Arbitration backfires to franchisee, in reference to Brazilian Law

This part is very interesting aspect, a case study based on Brazilian Franchise law and its view over the arbitration for the franchisee.

Adhesion contract an approach issues: Since one of the party makes the agreements and other has to take it p in TOTO, it is difficult by recessive party to approach for arbitration as such party is always in vulnerable situation, and dominant party will strike of all reason opposing them. In such case vulnerable party is always facing the problem of not only of losses, but also has doubts on standing for arbitration method.

On inclusion of Article 7(1) to the "Brazil Franchise Law" is considered *unnecessary* by Brazilian lawyers such as Thiago Marinho, Nunes and Gilberto Giusti. According to Giusti, the new provision could have a *backfire effect* on Brazilian arbitration in general, meaning that the present and prevailing legal text of the Brazilian Arbitration Act does not need to be ratified in subsequent statutes at all times, which could lead to *absurd interpretations* such as the use of arbitration to settle certain disputes possibly when permitted by the relevant legal statute.¹¹

According to Article 4 of Brazil's Arbitration Act (BAA), an adhesion contract (contracts in which the parties did not have the opportunity to present their terms of contract) contains arbitration clause. This clause is only enforceable if the parties take the necessary steps to begin an arbitration

¹¹ Ibid

proceeding, or if the parties agree to the initiation of an arbitration proceeding, provided that the provision is attached in a written form, with the parties' signature or a special approval for the provision.¹²

In the light of that provision, in 2016, Brazil's Superior Court ruled that: Franchise agreements are adhesion contracts Arbitration clauses inserted into franchise agreements without the franchisee's consent (in attached written form or in bold type) are invalid. This ruling is contrary to the principle of "Kommetenz-Kompetenz".¹³

The following is an analysis of possible consequences of the new franchise Law in relation to the above-mentioned case-law: · "The Superior Court is likely to recognize the validity of arbitration clauses in a franchising agreement even if the franchising agreement is considered to be an attachment contract," according to the authors, Paula Mena (Barreto), Vinícius (Pereira), Felipe (Hermann) and Kate Brown (DeVejar).¹⁴

The Appellate Court in São Paulo upheld the decision to make arbitration the new standard for franchisee contracts, citing the following arguments:¹⁵

1. The purpose of Article 4 (2) is to alert the "victim" in the case of an asymmetrical relationship. This means that the formal requirements must be justified by the fact that there is an asymmetrical relationship between the parties, in addition to the adhesion character of the contract.¹⁶
2. All business contracts are considered to be 'symmetrical', meaning that the 'vulnerable party' bears the burden of proving that there is an imbalance in the relationship between the parties. In the case of a franchise contract, since it is of an entrepreneurial nature, the burden of proving there is an imbalance between the parties falls on the claimant (who claims to be in a vulnerable position);¹⁷
3. The appellants have failed to demonstrate that the relationship between the parties is *unbalanced*, and the franchiser's use of pre-determined clauses in the contract that does

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ www.arbitrationblog.arbitrationklowers.com; www.cidra.com

¹⁶ Ibid

¹⁷ Ibid

not prove contradictory. Thus, the formal needs laid down in Art. 4(2) are not applicable to arbitration clause at issue.¹⁸

The sentence also confirms the application of the principle of ‘competence-competence’ as set out in the BAA’s Art. 8, that denied the Court of First Instance, the power to determine whether an arbitration clause is enforceable. The contrast between that statement and the above-mentioned argument of the judgment has not been examined further.

With the emergence of fast-track settlements in arduous international commercial cases, numerous parties have started to prefer emergency arbitration as an alternative to seek interim relief. As a result, many jurisdictions, such as India, US, UK, Germany, and China, as well as arbitration institutions like the International Chamber of Commerce and Stockholm Chamber of Commerce, have changed their national legislation to include newer and more effective dispute resolution methods within their scope. However, two fundamental issues remain unaddressed and have limited parties to choose emergency case of arbitration. One is the difficulty of enforcing an emergency arbitration award and the other is the effectiveness of such arbitration in relation to defense of the welfares of parties.¹⁹

Part II Industry Specific v/s applied Arbitration

This part is more of philosophical then theoretical or practical. First lets us probe into ‘Industry specific’ arbitration.

As we start understanding any substance, on flux of time we dive more into it and bring numerous thing from the sea including the pearl in shell. This industry specific word is similar to such concept.

We learnt about arbitration, than started to practice the arbitration. We started practicing in various field like architecture, business, partnership, engineering etc. And we learnt that all the field are rooted with some trade secret or some technical aspect or certain experience traits, and so do we come up with the concept of industry specific.

A number of industry bases The Indian example of a case in which the Supreme Court upheld an

¹⁸ <https://arbitrationblog.kluwerarbitration.com/2018/12/08/>; www.cidra.org

¹⁹ Ibid

award made by a SIAC arbitrator. The judgment was delivered in a case involving a dispute between two companies. In the case at hand, the judgment was delivered in favor of one of the parties. There is no explicit legislative provision in favor of an award made by an emergency arbitrator in India. However, in the case at issue, the Supreme Court upheld the award. This case is a good example of applying pro-arrangement principles and recommendations made in Law Commission Reports. Indian Arbitration Act 1996 The Law Commission Reports in Amazon (NV) investment Holdings Inc. versus Next Retail Ltd

1. International Commercial Arbitration: Rules device to cater International arbitration.
2. Arbitration Board of India: In order to encourage institutional arbitration in India, the government of India has proposed the establishment of the Indian Arbitration Council. The purpose of the ACI is to evaluate the functioning of arbitration institutions and to accredit the arbitrators.
3. Industry-specific Arbitration Centers: Many industry-specific arbitration centers have been set up in India to meet the specific requirements of various industries. For instance, the Mumbai center for international arbitration and the Delhi international arbitration center have been established to settle domestic and international commercial cases effectively.

Now, I come on my desire, whenever I have learned law I remember the Indian definition of Aphorism as

अल्पाक्षरं असन्दिग्धां सरवद विश्वतोमुखम् अस्तोभं अनवद्यान् च सूत्रं सूत्रं विदोः विदुः

i.e. Aphorism is less word, doubt free, complete meaning , universal, truth this is what aphorism is, and so is the rule of law it need not be bundles and bundles but must be universal and less to handle then it is law.

Now Industry specific laws are adding time to time to the arbitration act and that this is increasing the documents. So, to reduce the industry specific rule we need to use the term applied law instead of specific rules.

Now, again the question prevails that if we mention as applied law and deny the bundles of industry specific instruction what is way to cope up, and it simple means to add the Aleatory and Adhesion contract clause in the arbitration act.

So, let's avoid industry specific agreement/ arbitration, instead we need to start using the term

“Applied arbitration”

Conclusion

This paper has attempted to give exhaustive definition of the Franchise for the first time. In this paper we mention a special need of the ‘rules’ for arbitration in industry of Franchisee. Also, it takes a delight to state that understanding is one aspect and creating bundles of law is another aspect. Industry specific Arbitration rules are like growing and piling up bundles of laws, but to curtail it franchise law just mention that add the Aleatory and adhesion contract; like Singapore court, India too need to adopt opportunity in franchisee contract to initiate by ‘vulnerable’ party. And make every agreement bind by both the parties.

References:

1. Goldman, A. (2018). Franchise Arbitration: At the Intersection of Statutory Interpretation and Arbitration Law. *Journal of Dispute Resolution*, (1), 255-281
2. Munch, M. (2010). Franchisee Arbitration: The Pros, Cons and Potential Waivers. *St. John's Law Review*, (4), 1263-1294
3. Law relating to Arbitration and Conciliation in India, 4th Ed., Dr. N.V. Parajanpe, Central Law Agency, Allhabad, 2011
4. Borkowski, R. (2013). The Advantages and Disadvantages of Arbitration: Franchisees' and Franchisors' Views. *Journal of Hospitality & Tourism Research*, (4), 416-427
5. Nyaya Darshanam Boudhbharati, Nyaya Bhashya, Varansi 1976
6. Samkhya Karika Shloka
7. <https://arbitrationblog.kluwerarbitration.com/2018/12/08>
8. <https://arbitrationblog.kluwerarbitration.com/2022/12/06>
9. Franchising Arbitration in Brazil: What to Expect from the New Franchising Legislation?, arbitrationblog.kluwerarbitration.com, 2020
10. www.brainyquotes.com
11. Bare act of ‘The Financial Act, 1999’, published on incometax.gov.in, 1999
12. Report of Brazilian Franchise Law, 2020, published on lawsofbrazil.com, 2020
13. www.azquotes.com
14. www.cidra.com
15. www.drishtias.com