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AN OVERVIEW OF ARBITRATION PROCEDURE IN INDIA

ATUHORED BY - POORVA CHAWLA

Introduction

This article gives an overview of Arbitration in India, about its proceedings, agreement and enforcement of foreign awards.

Earlier there were no rights and no laws as people were not educated and did not have any knowledge regarding arbitration. But later, when people started getting civilized, the rights of individuals were considered which also gave birth to conflicts. In such cases, one party used to approach a third person whom they trust and resolve the matter with their suggestions. The same principle applies in today's era as well. As the need for globalization and commercial market is increasing, more disputes are being seen between the parties related to their contracts and agreement held between them which brings us back to a mutually decided person who will dissolve their dispute and in legal term, known as an "**Arbitrator**" or "**Mediator**". They are the people who are assigned the work to dissolve commercial disputes between the parties being an independent person, without approaching the court and saving their time and money.

Based on UNCITRAL model law India enacted the **Arbitration and Conciliation Act, 1996** further amended in 2015 which deals with domestic and international commercial arbitration in India. The amended Act especially emphasizes minimizing the role of judiciary court in arbitration proceedings and further to consider every arbitration order or award as a decree as it is been considered in civil procedure code. **The Act is categorized in two, Part I deals with significant provisions which deal with domestic and International commercial arbitration procedure to be conducted in India irrespective of nationality and Part II talks about enforcement of foreign arbitration award.**

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Arbitration agreement

Defined under Section 2(b) read with Section 7 of the Act.

It can be defined as a written statement or exchange of communication between the parties or any statement made through means of telecommunication. It is not compulsory for the parties to sign or un sign it. Even if an arbitration clause is present in the agreement, it would be considered as an arbitration agreement.

Rickners Verwaltung Gmbh vs. Indian Oil Corporation, 1998 stated that the intention of the party in arbitration gathers information in the form of expression and the meaning it conveys. An arbitration agreement would be a statement made by one party regarding the claim in dispute and not denied by the other party.

Non-Intervention of Court in the Arbitration process

As per **Section 5 of the Arbitration and Conciliation Act, 1996** the court cannot interfere in the arbitration proceeding except wherein provided by the act in the following situations:

- Where an arbitrator needs to be appointed when the parties cannot appoint a mutually independent arbitrator.
- In cases of taking the shreds of evidence.
- Where the court is ruling in the cases as the arbitrator is terminated due to incapacity or other sufficient reasons mentioned under the Act.

Section 8 is a companion section which says "where a party has approached the judicial court to dissolve a dispute and it is exclusively to be trialled by the arbitrator, then the court must direct the person to start the arbitration proceeding first without any delay and may come later to the court when arbitration award has been made."

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Interim measure

A party can seek interim measures for which two avenues are open to them which is:

- Approach the court under **Section 9**.
- They may approach the arbitral tribunal under **Section 17** of the Act.

Section 9 of the Act enables a person to approach the competent court before or after or during the arbitral proceedings are made but before the enforcement of the arbitration award.

In the case, **Sundaram Finance v. NEPC, 1999 (2) SCC 479** the Apex Court of India held that if a party approaches the court before the commencement of arbitration proceedings, he must serve a proper notice to the opposite party as to invoking the arbitration and further, the court must satisfy the party as to first approach the arbitrator and take effective steps to settle the dispute without any delay. For this purpose, the court must be satisfied as there exists a valid arbitration agreement between the parties.

Under **Section 17** the parties can also approach the arbitral tribunal and in such cases, the tribunal has the power to grant interim measures related to the subject matter in dispute. The interim measures are the urgent measures required by the party to preserve and protect his property; measure related to payment of claim etc.

Arbitrators

Appointment of the Arbitrator

The appointment of arbitrator is given under **Section 11** of the Act. The Act provides full freedom to the parties to appoint an arbitrator as of any nationality unless agreed by the parties. However, in the case of failure to appoint an arbitrator the parties can approach the court to make such an appointment. In case of domestic arbitration, the Chief Justice of the High Court has the authority to appoint an arbitrator to the parties and in case of International Commercial Arbitration, the Chief Justice of India has the authority to make such appointment as in India, the foreign disputes must be dealt by the highest judicial officers.

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In the case of **Konkan Railway Corporation v. Rani Construction Pvt Ltd, 2002** the Supreme Court held that the function of Chief Justice of India and his designates is to ensure the nomination of an arbitrator who is independent, competent and impartial and settles the dispute between the parties to the best of his knowledge.

Power and Duties of Arbitrator

Power	Duties
Pass Interim Order	Order of Appointment
Decide the Process of Arbitration Proceedings	Timely adjudicate the matter
He has the power to Terminate the procedure	Act Judicially and Impartial
Appointing an Expert person	Encourage settlement of the matter
Seeks Court permission in taking evidence	Misconduct is not allowed

Termination of an Arbitrator

The Act provides for the termination of an arbitrator under Section 14 of the Act and it can be made in two circumstances which are:

- If he fails to act without undue delay, &
- If he is unable to perform his function due to De jure or De facto.
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In case of any controversy regarding the situation, the parties can approach the court.

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Types of Arbitration proceedings

In India, the arbitration proceeding is broadly categorised into Ad-hoc arbitration and institution arbitration.

Under ad hoc arbitration the parties themselves commence the arbitration proceedings and determine the conduct of arbitration proceedings. In ad hoc arbitration if the parties are not able to appoint a mutual arbitrator, then either of the parties can invoke **Section 11** of the Act. Under ad hoc arbitration the parties and the arbitrator both have to agree on the fee of the arbitration proceedings which is usually expensive.

Under institutional arbitration, arbitration is administered by the arbitration institution. The parties can approach any arbitration institution and they themselves appoint an arbitrator and the proceedings can be commenced. The Indian Institution includes the Indian Council of Arbitration and International Centre for Alternative Dispute Resolution. The International institution includes the International Court of Arbitration, American Arbitration Association. All these institutions have expressly formed rules to deal with all the possible disputes with arbitration proceedings.

Arbitral proceedings

The arbitrators are the masters of the arbitration proceedings and can conduct the proceedings in the manner they feel appropriate. This power includes relevance, the weight of any evidence, admissibility. The only restriction on them is they need to treat both the parties with equality and both parties must be given equal opportunity to present his case, without any biasedness. The ***Indian Evidence Act, 1872*** and the ***Civil Procedure Code,1908*** both do not apply on the arbitration proceedings. Generally, oral documents are been considered on the request of the parties and a further piece of evidence can be presented if required. The arbitrator has the power to grant ex- parte order in a case where the respondent fails to appear in court or without sufficient cause fails to communicate his statement of defence, the arbitrator can grant ex-parte order. However, the court should not treat this order and act of the respondent as admission and use against him to terminate the proceedings.

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The Governing law

To determine the rules of law applicable to disputes, the law makes a distinction between the Domestic Arbitration and International Commercial Arbitration proceedings. Under International Commercial Arbitration, the court must apply the law of land, where the dispute arises and as agreed by the parties and in case of failure to do so the tribunal must apply rule of law considering appropriate as per the circumstances. Indian Courts have accepted long back that in case of absence of any arbitration agreement the arbitrator can apply the law which is most closely connected and relevant to the subject matter in dispute. However, the Indian tribunals are obliged to apply substantive law where the parties are Indian. Further, the tribunal can grant award as it deems fit and may pass the interest from the day of arising of the cause of action till the arbitration award has been granted as it seems reasonable. In the amendment Act, 2015 the interest rate has been increased by 2%.

In case of foreign dispute the rate of interest will be governed by The Civil Procedure Code, 1908 as it empowers the court to grant pendente lite interest as well as interest from the day of cause of action until the arbitration award is granted. In the case of commercial disputes, the rate of interest should not increase the contractual interest and in its absence, the tribunal can make interest as generally provided by the recognized banks and institutions.

Arbitral Award

The arbitration award granted by the arbitrator can be challenged under **Section 34** of the Act by making an application under it only based on grounds specified therein and they are as follows:

1. The party was under some incapability to make an application;
2. The arbitration agreement agreed by the parties was not valid as per the law;
3. The party making the application was not given proper notice for appointment of the arbitrator or arbitral proceedings;
4. The award made is out of the Scope of arbitration and does not deal with the dispute;
5. The award made is contrary to public policy;
6. The subject matter dealt is not capable of settlement by Arbitration.

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An application to set aside the award must be made within 3 months from the date of receipt of such award by the applicant which can be further extended to 30 days on giving sufficient cause of delay.

Conclusion

In the early period, the Concept of Arbitration was introduced but by the efforts of due recognition to Model Law of International Commercial Arbitration and Conciliation rules given by the United Nations Commission on trade and law (UNCITRAL). The model law and rules have played a significant role in the settlement of commercial disputes and provided rules to various other countries which they can adapt and make according to their municipal laws as earlier there was no unified law related to trade and its need felt when globalization started which further gave rise to disputes related to it. Further the Act was amended in 2015 with better updates.