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Arbitration and conciliation: Mechanisms of modern dispute resolution

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Abstract
The process of solving an argument between people by helping them to agree to an acceptable solution: Cambridge Manifesting with the idea of justice with cooperation arbitration was emerged. Arbitration is a modern modus operandi whereby the matter concerned is referred to an even-handed party for a binding decision which is referred to as "Award". The vital use of arbitration is commonly in resolving commercial disputes and contractual disputes.

Keywords: Arbitration, conciliation, mechanisms, dispute resolution, solving argument, acceptable solution, justice

Introduction

It does not deal with the criminal, insolvency, bankruptcy and many others laws. Arbitration is also classified into commercial arbitration. Commercial Arbitration was first evoked to settle the disputes between Medieval merchants in market areas in England and in Mediterranean and Baltic commercial maritime and on the European continent.

The term conciliation was coined through the UNICETRAL RULES on Conciliation, 1980. The term is not defined in the Arbitration and conciliation act. But simply putting conciliation is an ADR process where the conciliator helps the parties to the dispute to reach the negotiated agreement

Evolution Through Various Treaties

As per the biblical theory, King Solomon was the first arbitrator when he settled the issue between two women who were claiming to be the mother of a baby boy. Some authors have also asserted that the procedure used by King Solomon was similar to that used in arbitrations today. Arbitration was also used by Philip the Second, the father of Alexander the Great, for settlement of territorial disputes in Greece as far back as 337 B.C.

The arbitration globally was governed by various international treaties and conventions through which it evolved.

- **The Newyork Convention, 1958**

The two major conventions which recognized the international commercial arbitration agreement were the geneva protocol on arbitration clauses in commercial matters, 1923 and the geneva convention for the executon of foreign arbitral awards, 1927.

The convention on the recognition and enforcement of foreign arbitral awards (new york, 1958), better known as the new york convention, is one of the most important united nations treaties in the area of international trade law and the cornerstone of the international arbitration system. Under the new york convention, states undertake to give effect to an agreement to arbitrate, and to recognize and enforce awards made in other states

- **The Inter-American Convention**

It was earlier known as the Inter-American Convention on International Commercial Arbitration. it closely worked with the NEWYORK CONVENTION. It is also called the 'Panama Convention.'

- **European Convention on International Commecial Arbitration, 1961**

The convention came into force in 1964 with almost 31 states including EU and non-EU both. The convention grants the autonomy to the arbitrators and the parties to put forth the arbitration procedure.

Background Arbitration and Conciliation in India

According to Hindu law, the word "order" appears in the "Brihadaranyaka Upanishad". The famous Yajanavalkya mentions 3 popular courts. These three bodies, "PUGA" (Local Courts) and "SRENIS", are both workers and enterprises. "KULAS" members focus on the social problems of a particular community. The first law in India was the Indian Arbitration Act of 1899. The law was limited to the jurisdictions of Madras, Mumbai and Kolkata. Then came a complex law and a new arbitration law, the Arbitration Act of 1940, in the British government. When the law made peace it faced many problems. The law does not regulate the provisions regarding of a judge in the event of a judge's death. There is no mention in the Law of the judge resigning in the middle of the arbitration or making a decision, causing great harm to both parties to the dispute. After independence came the Arbitration Act, the Arbitration and Arbitration Act 1996. The law is based on the Constitution of the United Nations Commission on International Trade Law (UNCITRAL). The Law was later amended in 2015, the provisions of Article 2(2) were added and also the provisions of sections 8 and 9 of the Law were amended. The law was revised in 2019, re-establishing relevant provisions such as the appointment of arbitrators, the deadline for writing, the formation of the jury, and the registration of S42B. Recently, the Law was amended in 2021 after Arbitration and Conciliation (Amendment Act) 2021.

Applicability

The arbitration and Conciliation Act extends to the whole of India. Globally the act interpreted as to amend the laws relating to:

- International commercial arbitration
- domestic arbitration and
- for the enforcement of foreign arbitral award.

Process of Arbitration and Conciliation

Arbitral matters are the outside the court settlement matters. Simply expressing it is when the two parties settle the dispute outside the court and without involving court. Arbitration has a procedure which is mentioned in the 4 specific phases below:

- here the parties add an arbitration clause to their agreement and when any such dispute arises then any one party furnishes an arbitration notice to the other side informing Phase I about the dispute.
- Phase II The other party then revert to the notice and thereby the appointment of the arbitrator takes place considering all rules and regulations.
- Phase III With the formal hearings and written proceedings the arbitration proceedings will commence.
- Phase IV The arbitrator will now after hearing both the parties will give the final award or any interim relief necessary.
- Phase V If the arbitrator has already gave the final award and the judgement debtor is not convinced with the verdict then he can challenge the award before the competent Court.

Whereas *Conciliation* process is a less formal process where unlike the arbitrator, the conciliator does not have authority to ask for the evidences or witnesses. Thereby Conciliation as a process does not have any legal standing. The conciliation process can be done privately. Conciliation process is open for bargaining and it doesn't involve suit. In the conciliation process any person who suggests the possible solutions to the parties for the matter in dispute is known as the conciliator. The conciliator hears to each side separately during the whole negotiation process. And then the best solution will be suggested by the conciliator which is mutually acceptable by both the sides.

Necessity of Emerging laws from 1996 ACT

1. Appointment of the Arbitrators (S11)

Under the Arbitration and Conciliation Act, 1996 the parties were allowed to appoint the arbitrators by themselves and in case if any differences of opinion arise then the parties could approach to the Hon'ble Supreme Court or the respected High Court to appoint any person to be the arbitrator for the dispute.

IN 2019 keeping in mind to conserve the valuable amount of time of the Courts the Amendment Act empowers the Hon'ble Supreme Court and the High Court to designate the Arbitral institution with the objective of appointment of arbitrators as per S1(ca)of the Act. In case of non-fulfillment of the agreement now the parties do not have to approach to the courts but the arbitral institution will then appoint the arbitrator to resolve the dispute. The appointment of the Arbitrator shall be made within 30 days from the date of service of notice on the opposite party.

2. Appointment of sole arbitrators

S11 of the Act was unfurled with the leading case of *Perkins Eastment Architect DPC & Anr. vs. HSCC (India) Ltd.* whereby the contract was signed between the applicant and the Respondent which was specified with an Arbitration Clause saying that only Chief Managing Director of the espondent hat the CMD appointed the sole arbitrator.

Now the delay in appointment of the sole arbitrator was challenged by the applicant and he moved an application in the Hon'ble Supreme Court to appoint an impartial and fair arbitrator.

The Supreme Court relied on the Judgement given under the *TRF Ltd. vs. Energo Engineering Projects,* here the Managing Director of the company either has the power to act as an arbitrator or appoint an arbitrator. The MD then appointed the arbitrator and this appointment was firmly challenged. The Supreme Court while applying the constitutional principle of what cannot be done directly may not be done indirectly held that if md cannot be an arbitrator himself then he must not even appoint an arbitrator. He has no authority to appoint sole arbitrator.

In the Perkin's case Justice Uday Umesh Lalit and Justice Indu Malhotra concluded that a person who is not eligible to act as an arbitrator cannot also appoint an arbitrator.

1 Completion of Written Submissions

Earlier the 1996 Act did not provide for the time limit for making the submissions by the parties. But with the need of the time there was insertion of sub clause 4 of S23 and now the parties should submit the written statements within 6 months of the appointment of the arbitrators.

2 Establishment of Arbitration Council

The Arbitration council of India was much needed to regulate and to promote the functioning and grading of the arbitral institutions. This council consist of a Judge of Supreme Court, Chief Justice of High Court, Judge of High Court and any skilled eminent person who has expert knowledge of Arbitration administration and who can be appointed as chairperson. The appointments must be done by the Central Government after consulting the Chief Justice of India. The council make policies for appointments and sets the uniform system for arbitration for all ADR matters.

3 Confidentiality of proceedings

Except the disclosure of the arbitral award the proceedings and all the necessary details delt during the proceedings should be kept confidential. It leads to insertion of S42A.

4 Relaxation in time restrain for Arbitral Tribunal

Earlier the tribunals had to necessarily give the award within 12 months but this restriction is removed for commercial arbitration disputes and has been amended as Tribunals endeavor to dispose of matters within 12 months.

5 Blanket immunity to arbitrators

With the insertion of S42B the arbitrators now cannot be challenged or no suits can be filed against them for the act done by them in good faith.

The Arbitration and Conciliation (Amendment) Act, 2021

The most recent amendment has been made under the act in 2021. The amendment talks about the vital issues regarding arbitrators which says as follows:[8]

- For section 43J of the principal Act, the following section shall be substituted, namely: — "43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.".
- The Eighth Schedule to the principal Act shall be omitted.

- Arbitration and Conciliation (Amendment) Ordinance, 2020 is hereby repealed
- Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act.

Case Laws

1 Amazon vs Future Retail Case[18]

Amazon NV Investment Holdings purchased a 49% equity position in Future Coupons Limited and the transaction was worth Rs 2000 crores. Future Coupons owned 7.3% of Future Retail, implying that Amazon would indirectly own 3.5% of the company as a consequence of the acquisition. The call granted Amazon the right to purchase all or a portion of the assets of marketing business Future Retail and also gained credibility because of the same. According to the reports, the arrangement included a list of companies with which Future Retail could not conduct business, and Reliance Retail is one of them.

Future Ventures is formed through the merger of listed firms of several companies which includes Future Retail Ltd, Future Lifestyle Fashions Ltd, Future Consumer Ltd, Future Supply Chain Solutions Ltd, and Future Market Networks Ltd. The deal between the two entities was that Future Enterprises would sell its retail, wholesale, and warehousing businesses to Reliance Retail and Fashion Lifestyle Limited. In the deal, Reliance Retail and Fashion Lifestyle was to contribute Rs 1200 crore in a preferential stock offering and Rs 400 crore in Future Enterprises warrants. Future Group was in desperate times where it had lost Rs 7000 crore in the first few months of the pandemic and the sale of the company as a consequence of the revenue lost during the global pandemic. Before the arrangement could be closed, Amazon protested it, asserting that the agreement that it had with Future Coupons, which is the advertiser firm of Future Retail, had been breached.

Amazon also claimed that the agreement with Future Coupons had given it the 'call option' which authorised it to exercise the option of acquiring all or part of Future Retail's shareholding in the company, within three to ten years of the agreement and this right was disturbed by their deal. Subsequently, Amazon resorted to taking Future Retail into emergency arbitration before the Singapore International Arbitration Centre in October 2020.

- **Supreme Court's Judgement**

Amazon challenged the decision of the Division Bench overturning the Single Judge's status quo order by appealing to the Apex Court. The Supreme Court only issued an interim order urging the NCLT (National Tribunal Council) not to approve the acquisition deal and also allowed for the investigation of the case. The Supreme Court had postponed the hearing date as it had to attend to more important concerns.

2 Vodafone International Holdings BV (The Netherlands) v. Government of India, (2016)[19]

The judgement was as follows:

1 Claimant's claim that the breach of a bilateral investment treaty between the Kingdom of the Netherlands and the Republic of India for promotion and protection of investments done at The Hague on November 6, 1995, is considered and the Tribunal has jurisdiction over it.

2 There is a breach of Article 4(1) of the Bilateral Investment Treaty, by the Indian Government "the protection of the guarantee of fair and equitable treatment" is also violated.

3 The Government of India is not entitled to claim any tax from Vodafone and should stop any effort to recover the same.

4 The 60% cost of arbitration has to be paid by the government of India to the petitioners.

3 Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore) Fund, March 2021[20]

To decide whether the subject matter, in this case, was arbitrable, the Hon'ble Supreme Court looked to the recent decision in Vidya Drolia and Others v. Durga Trading Corporation, (2020). The Hon'ble Supreme Court stated that when a process is in rem, a dispute is non-arbitrable, and the IBC proceeding is to be deemed in rem only after it is allowed, based on the comprehensive analysis undertaken in Vidya Drolia. However, it should be emphasized that in this case, the application under Section 7 of the IBC was denied. Given the request to send parties to arbitration made under Section 8 of the Arbitration Act, the moot question was whether an application filed under Section 7 of the IBC before it was admitted may be referred to arbitration.

The Hon'ble Supreme Court noted that the legal position of IBC supersedes all other laws, as stipulated in Section 238 of the IBC, was well- established. In such a case, even though the corporate debtor filed an application under Section 8 of the Arbitration Act, the NCLT must consider the contentions raised in the application filed under Section 7 of the IBC, review the financial creditor's materials, and assess whether there is a default. Despite the presence of an arbitration agreement between the parties, if the NCLT comes to the inescapable conclusion that there is a default and the debt is due, no reference to arbitration will be made.

As a result, the Hon'ble Supreme Court clarified, while summarising the procedure, that in any proceeding pending before the NCLT under Section 7 of the IBC, if such petition is admitted upon the NCLT recording the satisfaction with regard to the default and the debt due from the corporate debtor, any subsequent application under Section 8 of the Arbitration Act will not be maintainable. As a result, based on the circumstances of the case, the Hon'ble Supreme Court determined that the NCLT's decision was reasonable, and Indus' motion for the establishment of the arbitral tribunal was granted.

Element	Usa		Europe (including uk) & singapore			India
	Icdr rules 2021	**Jams international arbitration rules 2021**	**Lcia rules 2020**	**Icc rules 2021**	**Scc rules 2017**	**The arbitration and conciliation act, 1996**
Location	New york with regional centers in bahrain, mexico city and singapore.[9]	California with international headquarters in london.[10]	London, with regional centers in new delhi and mauritius.[11]	Paris, with regional centers in hong kong, new york and singapore.	Stockholm.	It extends to the whole of india
Commencement	The date the icdr (as the "administrator" in all cases) receives the notice of arbitration (which also amounts to the statement Of claim).	The date on which jams issues a commencement letter.	The date the request and registration fee are received by the lcia registrar.	The date the request is received by the icc secretariat.	The date the request for arbitration is received by the scc.	It shall come into force on such date as the central government may, by notification in the official gazette, appoint.
Default number of arbitrators (where parties Have not agreed)	Sole arbitrator. Administrator may appoint three arbitrators if it sees fit.	Sole arbitrator. Jams may appoint three arbitrators if it sees fit.	Sole arbitrator. Lcia may appoint three arbitrators if it sees fit.	Sole arbitrator. The icc court may appoint three arbitrators if it sees fit.	No default - scc will determine if the case warrants one or three arbitrators.	The parties are free to determine the number of arbitrators, provided that such number shall not be an even number. Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.[12]
Jurisdictional challenges	The tribunal has the power to rule on its own jurisdiction and the validity of the arbitration agreement. Challenges to the Tribunal's jurisdiction should be submitted no later than the filing of the answer to the claim, counterclaim or setoff giving rise to the objection.	The tribunal has the power to rule on its own jurisdiction and the validity of the arbitration agreement. Challenges should be raised no later than the statement of defense or the reply (although a late objection can be admitted if the tribunal considers the delay justified in the Circumstances).	The tribunal has the power to rule on its own jurisdiction and authority and the validity of the arbitration agreement. Challenges should be raised as soon as possible and not Later than the statement of defense.	The tribunal has the power to rule on its own jurisdiction (and may refer to the icc secretary general) and the validity of the arbitration agreement.[13]	Challenges to be made to the scc board which is empowered to dismiss a case if the scc manifestly lacks jurisdiction.[14]	If any party wants to raise an objection regarding the jurisdiction of the arbitration tribunal, such objection shall be raised at the first instance, i.e., before or along with the submission defense statement but not later than that.
Timeframe for issuing the award	The award should be made no later than 60 days after the closing of the hearing (unless otherwise agreed by the parties, specified by law or determined by the icdr). If the international expedited procedures apply the award must be made within 30 days from the date of closing (unless otherwise agreed	The dispute should be heard and submitted to the tribunal for decision within nine months after the preliminary conference required by article 22, with the final award rendered within three months thereafter.	The tribunal shall seek to make its final award as soon as reasonably possible and shall endeavor to do soon later than three months after the last submission from the parties (whether made orally or in writing), in accordance with a timetable notified to the parties and the lcia	Within 6 months from the date of the last signature of the terms of reference, unless the icc court has fixed a different time limit based on the procedural timetable established by the tribunal. Can be extended upon reasoned request from the tribunal or on the icc court's own initiative.	6 months from the date of referral to the scc. Can be extended by the scc board upon a reasoned request from the tribunal or if otherwise deemed necessary.	The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

	by the parties, specified by law or determined by the icdr) (*article e-10*).		registrar as soon as practicable.			
Interim measures prior to constitution of Tribunal	A party may apply for emergency relief prior to the appointment of the tribunal. An emergency arbitrator shall be appointed by the icdr within 1 day of receipt of a valid application for emergency relief. The emergency arbitrator shall have all the authority vested in a tribunal under article 21(*arbitral jurisdiction*). The emergency arbitrator shall determine the application, and has the power to order or award any interim or conservancy measures that they deem necessary.	A party may apply for emergency relief prior to the appointment of the tribunal. An emergency arbitrator (usually appointed within 24 hours of the application) shall determine the application and shall enter an order or award granting or denying the relief sought.	A party may apply for the immediate appointment of temporary sole arbitrator to conduct emergency proceedings pending formation of the tribunal. This emergency arbitrator shall determine the application and may make any order or award which the tribunal could make. The emergency arbitrator will decide the claim for emergency relief within 14 days of appointment.	A party may apply to any judicial authority for any interim or conservatory measures before the case file is transmitted to the tribunal, without infringing or waiving the arbitration agreement or affecting the powers of the tribunal. Any party may apply for an emergency arbitrator before the constitution of the tribunal and, if the application is successful, an emergency arbitrator will usually be appointed within2 days from the icc secretariat's receipt of the application. The emergency arbitrator shall determine the application, and their Determination shall take the form of an order.	A party may apply for the appointment of an emergency arbitrator until the case has been referred to the tribunal. The emergency arbitrator shall determine the application for interim relief and has the power to order or award any interim relief that they deem necessary.	Under the new act 1996, section 9 empowers the court to order a party to take interim measure or protection when an application is made. Besides this section 17 gives power to the arbitral tribunal to order interim measures unless the agreement prohibits such power.[15]
Cost allocation	The tribunal may allocate the costs between the parties if it deems allocation reasonable, taking into account the circumstances of the case.	The tribunal may apportion arbitration costs among the parties if it considers such apportionment reasonable, taking into account the circumstances of the case. In apportioning costs, the tribunal may take into account a party's bad faith conduct.	The parties shall be jointly and severally liable to the lcia and the tribunal for the arbitration costs, and the tribunal will decide the proportions in which the parties shall bear such costs. The tribunal has the power to order that legal or other expenses incurred by a party be paid by another party and will base its decision on the general principle that costs should reflect the parties' relative Success.	The tribunal has discretion as to how to allocate the costs between the parties and shall take into account such circumstances as it considers relevant including the extent to which each party has conducted the arbitration in an expeditious and cost- effective manner.[16]	The tribunal is empowered to order one party to pay any reasonable costs incurred by the other party.	In the absence of any agreement to the contrary, section 31(8)(a) imposed a positive duty on the arbitral tribunal to fix costs of arbitration.[17] Section 31(8)(b) mandated the tribunal to specify the party entitled to costs, the party which shall pay the costs, the quantum or the method of determination of the amount and the way in which it shall be paid. Section 31(8) also contains an explanatory clause which defines "costs" and qualified "costs" as "reasonable" costs and is still subsisting.

4 Bharat Sanchar Nigam Ltd. and Anr. v. M/s. Nortel Networks India Pvt. Ltd[21]

The Supreme Court decided that the time limit for submitting an application under Section 11 of the Arbitration and Conciliation Act, 1996 is regulated by Article 137 of the first schedule of the Limitation Act, 1963. Article 137 is a supplemental provision that establishes a limitation period for any application for which no term of limitation is set forth in any of the Articles of the Limitation Act's Schedule. It specifies a three- year restriction term from the date on which the right to apply accrues.

The time of limitation will begin to run from the date of failing to appoint the arbitrator, according to the ruling, which was issued on March 10, 2021. "It is now reasonably well-settled that the limitation for submitting an application under Section 11 would emerge if the arbitrator was not appointed within 30 days after the issue of the notification seeking arbitration," the court said. In other words, an application under Section 11 can only be submitted after a notice of arbitration has been issued in respect of the specific claim(s) / dispute(s) to be referred to arbitration, and the appointment has not been made.

Conclusion

Resolving the matters through the process of arbitration and conciliation is a much handy process. It becomes cost effective, provides speedy justice and moreover time saving when the parties opt for outside the court settlement. But with the loopholes in the act and the system arbitration in India is still evolving and has yet to come to growth. The Indian judiciary still refrains to intervene in the arbitral awards. Comparing it with international arbitration system India have almost 35 arbitration centers still it does not stand with the reputed international arbitral organizations like International Court of Arbitration, the London Court of International Arbitration, Singapore International Arbitration Centre. Also, to make India arbitration friendly we need to remove the hurdle of heavy arbitration fees, though through the amendments the court has put a bar on it. There is a need of more arbitration practitioners in India to make arbitration not a choice but a priority.

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