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The Mechanism of Arbitration

Parth Rishik

ABSTRACT

This paper will focus on Arbitration and will explain the mechanism of how Arbitration works. Firstly, the paper will in brief describe the various Alternative Dispute Resolution, and why it is needed. It will further probe into different adjudication or procedures available under Alternative Dispute Resolution which is Negotiation, Mediation, Conciliation, and Arbitration. From here the authors will probe further into the procedure of Arbitration as per the Arbitration and Conciliation Act 1996. The paper will explain the need and significance of Arbitration to a corporate and how confidentiality sustains the corporate image and resolve the dispute in a time saving and economic manner. The paper will discuss how parties to a contractual agreement will initiate if there is a dispute within the nexus of the contact, what is the role of court during an arbitral proceeding, how parties to the contract will choose an arbitrator or a panel of the arbitrator, what is an arbitral tribunal as well as its jurisdiction, the procedure of arbitration and what are the grounds for setting aside the arbitral award. The paper will an analytical study on the overview of the Arbitration and Conciliation Act 1996. The various changes and how it is still evolving will be presented in this paper.

ALTERNATIVE DISPUTE RESOLUTION

The adjudication of legal matters is shouldered on the Judicial Structure of India. The Judiciary is the sole body of the Indian Democratic system results in traffic in the courtroom. To deal with the situation of pendency of cases in the courts of India, ADR plays a significant role in India by its diverse techniques. Alternative Dispute Resolution mechanism provides scientifically developed techniques to the Indian judiciary which helps in reducing the burden on the courts.[1] In November 2019 Union Law Minister Ravi Shankar Prasad that there are 59,867 cases pending in Supreme Court and 44.75 Lakh in Various high courts. Which shows the stats of cases pending in courts stands at 3.14 crore.[2] With such traffic pending at various courts possesses difficulty for corporate people who have met a dispute in nexus with the contractual agreement and these disputes need immediate attention as it affects the working of a business which if goes untreated for long might even result in winding up of the business. This is where Alternative Dispute Resolution comes into the picture. ADR is an adjudicating method opted by people who seek immediate action to resolve a dispute. Its also called outside the court settlement and as the name suggests it takes off burdens from the judiciary on certain matters. In ADR the parties to dispute decided that they will address the dispute not through the means of litigation but through the mechanics of ADR which is consist of:

1. Mediation and Conciliation – Mediation is a process in which parties to dispute appoint a mediator who acts within the capacity of mediation to bring a settlement among the parties. The settlement passed by a mediator is not binding on the parties. While conciliation is quite a similar process but it is only related to employment. It focuses on a dispute arising between employers and employees during the course of employment. In many employments, institutions make it compulsory that a dispute during the course of employment should be first addressed through conciliation, and then only one can approach Employment Tribunal. The process of mediation and conciliation works on the basis of negotiation, in which both parties try to find mutual ground and drive benefit out of it.
2. Adjudication – This form of ADR is connected and focused on disputes arising out of construction contracts. In this process, the parties to dispute work in a non-flexible formal manner unlike that of Mediation and Conciliation. Notice of adjudication is given out to the other party acknowledging the details of the dispute. This is followed by the

[1] Anubhav Pandey, All you need to know about Alternative Dispute Resolution (ADR), Ipleaders, (May 8 2020, 12:28 pm) https://www.stu.ca/media/stu/site-content/documents/Bluebook.pdf .
[2] Over 3.5 Crore Cases Pending Across Courts in India, Little Change in Numbers Since 2014, The Wire, (May 8 2020, 1:20 pm) https://thewire.in/law/pending-court-cases .

appointment of an adjudicator with mutual permission of the parties to the dispute. It is necessary that the adjudicator must read a decision with 28 days. The decision passed by an adjudicator is final and binding. This process is fast and more economical as compared to cases that are fought through litigation channels following the Real Estate Regulatory Authority.

3. Arbitration – This process of ADR is more formal than that of Mediation. This process is prescribed as an arbitration clause within the parent contractual agreement or addition as a stipulation to the contractual agreement that addresses if a dispute arises the parties within the nexus of the contract will seek resolution through the process of Arbitration. The mechanics of Arbitration will be described further in detail in the research work.

These various processes of ADR ensure a fast resolution compared to the ordinary hearing of a court which is bombarded with pending cases. These methods ensure that the business does not face any immediate slow down due to a dispute arising out of the contractual agreement. In today's time, ADR is quite common in the corporate world, as it is not only time saving and economic but also ensures the confidentiality of the disputed matter from becoming public, which safeguards the goodwill of the company.

ARBITRATION (ARBITRATION AND CONCILIATION ACT, 1996)

Arbitration acts as a procedural law in the matters of dispute arising out of contracts in the matters of merger and acquisition, insolvency and bankruptcy, etc. Arbitration comes under Alternative dispute resolution as already discussed before in the paper. Thus, it is a part of Alternative Dispute Resolution.

In India, the process of arbitration is regulated as per the Arbitration and Conciliation Act, 1996. Following the UNICITRAL 1985 and the recommendation of the UN General Assembly, the Indian Parliament constituted the Arbitration and Conciliation act. With an intent to align with the Model Law and establish a uniform law of arbitral procedures, the provisions were similar to the International counterparts. This paper will provide an analytical study of the Act in relation with the latest 2016 Amendment to the act.

The act contains four parts and eighty-six sections with seven schedules. Part one of the act is related to Arbitration; Part two of the act is related to Enforcement of certain foreign awards, Part three is related to conciliation; and Part four is related to various supplementary provisions. For

this paper, only part one, two and four will be analytically studied and the provision related to conciliation will be left out.

BASIC DEFINITIONS UNDER ARBITRATION AND CONCILIATION ACT 1996:

A. Arbitration - Arbitration is "a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound".[3] Whereas the act defines arbitration under section 2 subsection (a) as "arbitration" means any arbitration whether or not administered by permanent arbitral institution."[4] Thus, arbitration can be defined as a mechanism for the resolution of disputes that usually takes place in private, pursuant to an agreement between two parties or more parties under which the parties agrees to be bound by the decision of the arbitrator to be given in accordance to the law. This requires an agreement to refer a matter to arbitration, the privacy of the proceedings, an adjudication and the finality of the decision.[5] The given law recognises any arbitration whether or not it is administered by an arbitral institution.[6] Arbitration is of two kinds:

   1. Ad hoc arbitration – In this, an arbitrator or panel of arbitrator are appointed by the mutual consent of the parties to dispute.

   2. Institutional arbitration – In this, the parties to dispute approach an institution to facilitate the proceedings of arbitration. For instance, Mumbai Centre for international Arbitration and Singapore International Arbitration Centre are two examples of institutional arbitration.

B. Arbitrational Agreement - The process of arbitration is initiated with implementing the arbitration agreement between two parties who came to a dispute in their parent contractual agreement, the arbitrational agreement acts as a stipulation to the parent contractual agreement. The term "arbitrational agreement" is defined under section 7 of the Arbitration and conciliation act 1996. It defines it as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between

[3] Barraclough, Andrew and Jeff Waincymer. "Mandatory Rules of Law in International Commercial Arbitration". Melbourne Journal of International Law, see~ http://www.austlii.edu.au/au/journals/MelbJIL/2005/9.html. (last visited 11th May 2020)
[4] Arbitration and Conciliation Act, 1996, No. 26, Section 2 subsection a.
[5] Krishan, R., 2004. Overview of the Arbitration and Conciliation Act 1996, An. *J. Int'l Arb.*, *21*, p.263.
[6] As per the section 2 (1) a of the Arbitration and Conciliation act.

them in respect of a defined legal relationship, whether contractual or not.[7]" Under subsection 2 of section 7 it is clearly mentioned that arbitrational agreement need not to be an separate agreement or contract, it can be clause to the parent contractual agreement; Subsection 2 of section 7 of Arbitration agreement states "An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[8]"

C. Arbitrator – The person who is empowered under the Arbitration and Conciliation Act, to announce a decree or order, which is called arbitral award or award is called Arbitrator. The act refrains from specifically mentioning an arbitrator. The arbitrator is an impartial person appointed by the parties involved in an arbitration to resolve the dispute. An arbitrator is appointed after his express consent is taken. The parties to an arbitration can appoint a sole arbitrator or a tribunal consisting of any number of arbitrators, provided that it is not an even number.[9]

There has been specific provision for appointing the arbitrator for an arbitration. But primarily an arbitrator shall not have vested interests in the dispute or the parties[10]. If the arbitrator have some kind of interest with any of the parties to the dispute then it is up to the parties to let him perform as an arbitrator or seek another arbitrator. Section 6 of the act further, establishes that the matter of arbitration can be taken up by an institute [11]as well, which is called institutional arbitration. Section 6 further in collaboration with section 11(3) empowers the parties to dispute to appoint the arbitrator.

D. Arbitral Award – The decision passed by an arbitrator or panel of arbitrator in the matter of arbitration, in the favour of one of the parties to dispute is called an arbitral award. The arbitral award is passed upon the evidences procured by the parties to dispute as well as arguments forwarded. The award passed by the arbitrator is binding in nature. The award must be in writing and be signed by all members of the tribunal or signed by the majority with reasons for any omitted signatures. The Arbitration and Conciliation Act requires the award to set out the reasons on which it is based, unless the parties have agreed that no reasons are to be given. The award should state the date and place of the arbitration, and

[7] Arbitration and Conciliation Act, 1996, No. 26, sec.7.
[8] Arbitration and Conciliation Act, 1996, No. 26, sec.7 sub-sec. 2.
[9] Arbitration and Conciliation Act, 1996, No. 26, sec.10.
[10] Arbitration and Conciliation Act, 1996, No. 26, sec. 12 sub-sec. a.
[11] Arbitration and Conciliation Act, 1996, No. 26, sec. 6.

a signed copy must be delivered to each party.[12] As per the Section 29A[13]., an arbitral award must be made within a period of twelve months from the date of arbitral tribunal enters upon the reference[14].

ROLE OF THE COURT

The very essential and fundamental part of the act is that the role of the court has been minimized. As per the act, any matter in front of the judicial authority which involves a dispute to a contractual agreement, and the same agreement contains arbitrational clause then the matter shall be refereed to arbitration. Further, it also ensures that no judicial authority interferes except provided under section 5 of the act. In the subject matter of arbitration, parties to dispute can approach the court in only two cases:

a. for any interim measure of protection or injunction or for any appointment of receiver etc.

b. for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator.[15]

JURISDICTION OF ARBITRAL TRIBUNAL

Arbitration and conciliation acts empower the arbitral tribunal to over rule on its own jurisdiction that includes any question or objection to the existing arbitration clause. The arbitration agreement or the arbitration clause to the parent contractual agreement will be independent in case the parent contractual agreement stands invalid. Thus, even if a contract is invalid, the arbitration clause or the attached arbitration contract empowers the arbitrator to entertain the matter in arbitral tribunal.

In the landmark case of SBP & Co. v. Patel Engg Ltd[16], the court concluded that:

[12] White and Case LLP, Arbitration Awards in India, Lexology, see ~ https://www.lexology.com/library/detail.aspx?g=8c489b6a-7fc5-44ef-80f3-a56616272874 (last visited 14th May, 2020).
[13] Ins. By Act 3 of 2016, sec. 15 (w.e.f 23.10.2015)
[14] Arbitration and Conciliation Act, 1996, No. 26, sec. 29A.
[15] Sumeet Kachwaha and Dharmendra Rautray, ARBITRATION IN INDIA: AN OVERVIEW, Kachwaha & Partners, Pg. no. 4., see ~ https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf
[16] 8 (2005) 8 SCC 618

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) The District Judge does not have the authority under Section 11(6) of the Act to make appointment of an arbitrator.

(vi) The High Court cannot interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act (appealable orders) or in terms of Section 34 of the Act (setting aside or arbitral award).

(vii) Since it is a judicial order, an appeal will lie against the order passed by the Chief Justice of the High Court or by the designated Judge of that Court only under Article 136 of the Constitution to the Supreme Court.

(viii) No appeal shall lie against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) Where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

CONDUCT OF ARBITRATION PROCEEDING

The arbitrators have full control over the proceedings of the arbitration and they may conduct the procedure "in the manner they consider appropriate." Which empowers them to determine the admissibility, relevance, materiality and weight of any evidence[17]. The only limitation on the arbitrator is that they shall treat the parties with equality and each party shall be given a full opportunity to present his case[18], which includes sufficient advance notice of any hearing or meeting[19].

The act also clearly states that Civil Procedure Code and Indian Evidence Act shall not be applicable to the process of arbitration[20]. If not specified by the parties to dispute, it is up to the arbitral tribunal to decide if to have oral arguments and presentation of evidence or the tribunal shall only work on the basis of documentation[21].

In case of International Commercial Arbitration, it's up to the parties to decide over the governing law for the subject matter of dispute. If the governing laws are not specified by the parties it's up to the arbitral tribunal to choose any law they deem appropriate for the resolution of dispute. For domestic matter, however, the arbitrational tribunal is restricted to only use the Indian substantive laws. The Supreme Court in TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.[22] held that irrespective of where the 'central management and control is exercised' by a company, companies incorporated in India, cannot choose foreign law as the governing law of their arbitration.

Further, The Indian Oath's Act 1969 extends to persons who may be authorized by consent of parties to receive evidence. This Act thus, encompasses arbitral proceedings as well[23]. Therefore, Section 8 of the aforementioned act is also available which the Arbitral Tribunal uses to administer oath from witnesses "shall be bound to state the truth on such subject." If, a witness lies or does

[17] Arbitration and Conciliation Act, 1996, No. 26, sec. 19 (3) and (4).
[18] Arbitration and Conciliation Act, 1996, No. 26, sec. 18.
[19] Arbitration and Conciliation Act, 1996, No. 26, sec. 24(2).
[20] Arbitration and Conciliation Act, 1996, No. 26, sec. 19.
Indian Evidence Act 1872, sec. 1.
[21] Arbitration and Conciliation Act, 1996, No. 26, sec. 24.
[22] 2008 (2) Arb LR 439 (SC)
[23] Raipur Development Authority v. Chokhamal Contractors, (1989) 2 SCC 721.

not comply then he or she will be treated under IPC[24]. At the same time the act also ensures that no witness shall be brought in front of the tribunal without their want, vide section 27 of the act.

SETTING ASIDE AN AWARD

The basis of setting aside an award, wheather in domestic or international commercial arbitration is given under Section 34 of the Act, which is quite similar to Article 34 of the Model law. The grounds for the same are as follows:

a. a party was under some incapacity; or

b. the arbitration agreement was not valid under the governing law; or

c. a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or

d. the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or

e. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

f. the subject matter of the dispute is not capable of settlement by arbitration; or

g. the arbitral award is in conflict with the public policy of India.[25]

The act further provides that challenge to such an award should be made within 30 days of time but at the same time provides power to the court for another 30-day extension if evidence of sufficient cause is presented.

Section 34 of the act has been controversial as whether an award is liable to be challenged on merits. The view which was held in the case of Renu Sagar Power Co. Ltd. v. General Electric Co.[26] has shifted to a new view held in the case of Oil and Natural Gas Corporation vs. Saw Pipes[27],

[24] Indian Penal Code, sec. 191 and 193.
[25] Sumeet Kachwaha and Dharmendra Rautray, ARBITRATION IN INDIA: AN OVERVIEW, Kachwaha & Partners, Pg. no. 4., see ~ https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf (last visited on 22nd May, 2020).
[26] (1994) Supp (1) SCC 644.
[27] (2003) 5 SCC 705.

where the court added an additional ground of "patent illegality", thereby considerably widening the scope of judicial review on the merits of the decision. The Supreme Court observed:

"But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside. ……..

Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality'."

Therefore, it is still evolving as the court is taking a turn to adopt the wider meaning of public policy.

CONCLUSION

The UNCITRAL Model Law on International Commercial Arbitration [28]("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission.[29] The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[30] The Arbitration and Conciliation act 1966 is based on the very UNCITRAL Model law and is evolving with time.

[28] Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I; United Nations publication, Sales No. E.95.V.18.
[29] UNCITRAL 2012 Digest of case law on the Model Law on International Commercial Arbitration, Pg. 1, see ~ https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (visited on 23rd May, 2020).
[30] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, see ~ https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration (visited on 24th May, 2020).