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Historical Growth of Arbitration Law in India

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Abstract: Arbitration fundamentally is a dispute settlement mechanism through which the litigants to the dispute get their dispute resolved through a third person called the arbitrator without having to go by the traditional way of court of law. Arbitration as one of the methods of dispute resolution is recently gaining considerable importance and also being recognized at the world stage as an instrument for settlement of disputes. Almost all the business enterprises are carrying an arbitration clause. "An independent and efficient judicial system is one of the basic structure of our constitution …It is out constitutional obligation to ensure that the backlog of cases is decreased and efforts are made to increase the disposal of cases."[1]In today's time of, where there is explosion of litigation in the courts of law, there is a high need for mechanism like arbitration. Fair, economic, rational and speedy deliverance of justice is the endeavor of every legal system. However, currently there is growing crisis of judicial delay and arrears before the courts. To tackle this problem of overburdened judiciary various methods have been tried but still the number of unresolved disputes remain due to population explosion, more right awareness among citizens and various other inevitable reasons. Hence there is a high time need to resort to find a quick and easy method of dispute resolution. Arbitration is one of the alternatives to remedy the situation.

Arbitration law has his history from time immemorial right back from the medieval, British, post and pre Independence period after a long scroll by trial and error has been carved out suitably to meet the demands of the litigants both related to economic and commercial transactions ultimately to secure ends of justice. The reason behind the enactment of the Arbitration and Conciliation Act, 1996 being the present legislative enactment of the arbitration law is to come out with such methods which would make arbitral procedure fair, efficient and capable of meeting the very objective of the arbitration act and to minimize the supervisory role of courts in the arbitral process and to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings in settlement of disputes. Section 5 of the Act clearly states the objective of the entire act namely to that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the courts intervention should be minimal.[2]One of the main objectives of enactment on Arbitration and Conciliation

[1] Brij Mohan Lal v Union of India & Others 2002 4 Scale 433.
[2] P.Anand Gajapathi Raju v P.V.G.Raju AIR 2000 SC 1886.

in 1996 is minimizing the supervisory role of the courts in arbitral process. The Statement of Objects and Reasons contained in the Arbitration and Conciliation Bill, 1996 emphasized the objective of minimization of the interference of the courts in arbitration process. In accordance with the provisions of the Arbitration and Conciliation Act, 1996 the interference of the courts is very limited in matters relating to arbitration except in specified circumstances as compared to the old Act, of 1940. Moreover, the interference of the courts can be termed as court assistance instead of saying court interference. The Court will not come in the way of arbitration matters at all from the commencement of arbitration proceedings till the arbitral award is made. Section 5 of the Act, 1996 provides for the extent of judicial intervention which says that "notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part".. Therefore, the judicial intervention has been restricted and minimized. Under Section 5, the words used are "Judicial Authority" which is a wider term than the word "Court" and judicial authority includes all such authorities agencies conferred with the judicial powers of the Government.

As the application of this act is concerned, the concern whether a transaction relates to a civil dispute or commercial dispute is not relevant here. The only criterion that holds importance is existence of arbitration agreement. Arbitrability does not depend upon the question whether the deal is a civil dispute or commercial dispute.

However, equal emphasis is focused to caution that under the pretext of finding a solution to the problem of judicial delays and arrears before the courts of aw it is also equally significant to focus that the aspiration to secure quick and economic disposal significant to focus that the aspiration to secure quick and economic disposal of cases is not to affect the cardinal principle that the decision should be just and fair. Justice cannot be hurried to be buried so as the arbitral award should not be an arbitrary award. A deep and persuasive judicial intervention as contemplated in the arbitration legislation is sourced to be a functionary methodology to attain these objectivity to provide speedy justice both quantitatively and qualitatively.

The aim of the act being finding methods through which commercial and civil disputes could be speedily disposed of, doesn't mean that it would be done at the cost of compromising on justice. Justice ought to be placed at the altar for the purpose of speedy disposal of cases. The Act also prudentially contemplated to enable the court to intervene whenever justice seems to have been tampered with for the purpose of achieving quick disposal of the case. Supreme Court and High Courts being the constitutional courts are been given the power to discharge justice even in economic and commercial transactions in relation to the matters that are brought before them. By the intervention of the court justice seems to be done. If it is viewed that intervention of the court seems to delay the process of acquiring justice, this would be a

wrong notion to consider as justice is done at least in proper sense. Speedy justice is the blend of both and it is the need of the hour in the matters related to economic and commercial transactions including arbitration matters.

The significance of the procedures of arbitration as a mechanism for speedy justice can be seen in all spectrum and this has also been reflected in Section 89 of the Civil Procedure Code.[3] As per this provision whenever it appears to the court a possibility of the dispute been resolved by parties through a settlement, the court may after satisfying the conditions therein refer the parties to any of the alternative dispute settlement mechanism listed in the said section. In case the court refers the parties for arbitration or conciliation than the Arbitration and Conciliation Act 1996 shall apply as if the proceedings for the arbitration or conciliation were referred for settlement under the provisions of the Act.

ORIGIN, GROWTH AND DEVELOPMENT OF ARBITRATION IN INDIA

It has been observed that whenever two people get together for the purpose of transaction of business, misunderstanding and conflict is very common between them. Such conflict needs resolution, especially the kind that is quick and effective. Knowing the nature of dispute resolution through litigation, it is time to look at alternative means of settling disputes. In this context it is essential to look towards arbitration as one of the effective means of dispute settlement.

Arbitration is not a new concept for India. It was prevalent at the Vedic times in India which is traced from the Pradvivaca Upanishad. The Arbitration law in India developed through the pages of the history in the due course of time. Some loopholes were noticed in the laws related to arbitration whenever it was enacted through the passage of time that led to the enactment of the present Act, Arbitration and

[3] Section 89 of Code of Civil Procedure, 1908(as inserted by C.P.C.(Amendment) Act, No 46 of 1999) Settlement of dispute outside the Court (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for;
(a) arbitration;
(b) conciliation
(c) judicial settlement including settlement through Lok Adalat; or
(d) Mediation.
(2)Where a dispute had been referred-
(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.
(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

Conciliation Act, 1996, which is based on the UNCITRAL model law. Though even the said Act suffered from certain deficiencies which were further looked into through the Amendment of 2015.

The businessman start their business with the sole motive of earning profit thinking that they will be able to run their business smoothly during the course of time. Nevertheless, the dispute comes out between the parties to the business and such dispute require a method through which it could be resolved. The formal courts in India are burdened with huge pending litigation which needs to be settled as early as possible but because of various factors like vacancy in the courts, strike by lawyers and delay made by lawyers intentionally during the proceedings etc. the speedy settlement of dispute by Formal Courts are nothing but a nightmare for the parties involved in the disputes.

These factors are somehow responsible that led the businessman to go to the Arbitration for resolving their dispute which occurred during the course of the business. The Arbitration system is however also not free from shortcoming. These shortcomings were checked time and again and developed for the purpose of smooth functioning. The main purpose of Arbitration law in India is to give speedy remedy to the parties to the dispute. The award of the arbitrator is regarded as the decree of the court.

The judicial system in India is plagued by delay. Quick redressal has become an exclusive target. In fact, the citizen fear litigation due to the known delay factor. An average civil suit might take years together to be resolved. For all one knows, a delay in justice might be a denial of justice.

Historical Growth of Arbitration Law in India

Ancient India

Arbitration or mediation as an alternative to dispute resolution by municipal courts has been prevalent in India from the Vedic times. In the Brhadranayaka Upanishad, saga Yajnavalkya refers to the various types of arbitral bodies like (a) The Puga (a body of persons belongings to the different sects and tribes but residing in the same locality), (b)The Sreni (an assembly of tradesmen) and artisans belonging to different tribes but connected in some way with each other and (c)The Kula (a group of persons bound by family ties). Such bodies were known as panchayats and there members were known as panchas. Proceedings before these bodies were of informal nature, free from cumbersome technicalities if the municipal courts. Moreover, as the members of these bodies were drawn from the same locality and often from the same walk of the life as the parties to the dispute, the facts and events could not be concealed from them.

The decision of these bodies were final and binding on the parties. An aggrieved party could, however, go in appeal against the decision of the Kula to the Sreni; from the decision of the Sreni to the Puga and finally to the Pradvivaca. Though these bodies were non-governmental and the proceedings before them were of informal nature, their decision were reviewable by the municipal courts.

In the absence of some serious flaws of bias or misconduct, by and large the courts have given recognition and credence to the awards of the Panchayats. For instance, in the case of Sitanna v Viranna[4], the Privy Council affirmed an award of the Panchayat in a family dispute, challenged after about 42 years. These arbitral bodies dealt with a variety of disputes, such as dispute of contractual, matrimonial and even criminal nature. The power of ultimate arbiter between its subjects was vested with the Raja. However with changing times and also change in social and economic conditions these arbitral bodies became outmoded and inadequate in its functioning, albeit in some form or other, even today, some variants of such arbitral bodies are prevalent in some rural and tribal areas in the country.

The Muslim Law came to India with Islam which came via Cochin, Surat and Bombay harbor's in the south west and Khyber Pass in the north. Imam Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad in the commentary, which came to be known as the Hedaya, systematically complied the Muslim Law. The language of this book was Arabic but it was translated into Persian by Sheikh Burhan-ul-din Ali Bin Abu Bakar Al-Marghinani of Ferghana in Afganistan. During the Muslim rule, all the Muslims in India were governed by the Islamic laws; The Shariah, as contained in the Hedaya.[5] The non-Muslims were continued to be governed by their own personal laws.

The Hedaya conatins provisions for the arbitration between parties. The Arabics word for arbitration is Tahkleen while the word for an arbitrator is Hakam. An arbitrator was required to possess the qualities essential for a Kazee- an official judge presiding over a court of law. Certain types of persons were prohibited from acting as an arbitrator.

In cases, where the parties to a contract or dispute are Muslims, Shari'ah law governs the entire arbitral process, both procedurally and substantively. The seat of arbitration has no relevance to the procedure to be followed, though to ensure validity of the award at seat of arbitration, any mandatory rules of the seat should be observed. If one party is a Muslim, the non-Muslim party has the option to decide whether or not to settle the dispute according to Shari'ah rules. If the non-Muslim party does not agree to be governed by Shari'ah rules, the law applicable will be either as agreed between the parties or by application of choice of law rules.

According to Shari'ah,any award made under any other law is a foreign award, Even if a single condition required by Shari'ah is not fulfilled, the award will be deemed to be a foreign award. The court has jurisdiction to enforce such awards, though it is not entitled to review the merits of the dispute or the reasoning of the arbitrator. Nevertheless, the court can examine the formal conditions such as the

[4] AIR 1934 PC 105, 107.
[5] O.P.Malhatora, 'The law and practice of Arbitration and Conciliation' 2nd edn, (Lexix Nexix-Butterworths Publications: New Delhi 2002) p-5.

existence or the validity of agreement to arbitrate, whether the award has been made by all the arbitrators and whether it deals with the merit in dispute.[6]

British Rule

"The East India Company did not abrogate the law relating to arbitration as prevalent in the country at the time it came into power. But between the years 1772 and 1872 the government gave legislative form to the law of arbitration by promulgating regulations in the three presidency towns viz Calcutta[7], Bombay[8], and Madras[9] in the exercise of the powers conferred upon it by the British Parliament. These regulations lacked uniformity of details and clarity. However, they introduced substantial changes in the Panchayat system in the Presidency towns. For instance, the Bengal Regulations LVIII of 1781 provided that 'the judge do recommend and so far as he can without compulsion, prevail upon the parties to submit to arbitration of one person to be mutually agreed upon by the parties. I t further provided that no award of an arbitrator or arbitrators, can be set aside, except upon full proof made by oath of the credible witnesses that arbitrators have been guilty of gross corruption or partiality to the cause in which they had made their award."

The Bengal Regulations of 1787, 1793 and 1795 introduced certain procedural changes by empowering the court to refer suit to arbitration with the consent of the parties and further authorizing the court to promote references of cases not exceeding Rs 200 in value to arbitration and dispute relating to partnership account, debts, disputed bargains and breach of contract. They also laid down the procedure for conducting arbitration proceedings before the arbitration. The Bengal Regulation of 1793 was extended to the city of Banaras in the year 1795. The limits of jurisdiction of arbitration was extended by the Bengal Regulation of 1802, 1814 and 1883 by making diverse procedural changes. Likewise, in the Presidency town of Madras, the Regulation of 1816 empowered the district Munsifs to convene district Panchayats for selling disputes of a civil nature in connection with real estate and personal property. In the Presidency town of Bombay, the Regulation VII of 1827 provided for settlement of civil disputes and also laid down that arbitration shall be in writing to a named arbitrator, wherein the time for making the award had to be stated[10]. These remained in force till the Civil Procedure Code 1859 (Act No 7 of 1859) was extended to the Presidency towns as well in 1862.

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[6] Ibid, pp- 6-7.
[7] Ibid, p7.
[8] Ibid, p7.
[9] Ibid, p7.
[10] Nuseerwanji v Moynoodeen (1855) 6 MIA 134.

The Code of Civil Procedure Act 1859

"After the establishment of the Legislative Council for India in 1834, it passed the Code of Civil Procedure Act 1859(Act No 8 of 1859) with the object of codifying the procedure of Civil Courts except those established by the Royal Charters, namely the High Courts in the Presidency towns of Calcutta, Bombay and Madras. Section 312 to 325 dealt with arbitration in suits while sections 326 and 327 provided for arbitration without court intervention. The Regulations in the Presidency towns continued to remain in force till the Civil Procedure Code 1859 was extended to the presidency town in the year 1862."

The Code of Civil Procedure Acts 1877 and 1882

"The Act of 1859 was repealed by the Code of Civil Procedure Act 1877, which was again revised in the year 1882 by the Code of Civil Procedure 1882(Act No 14 1882). The provisions relating to arbitration were mutatis mutandis reproduced in sections 506 to 526 of the new Act."

Indian Arbitration Act 1899

The Legislative Council enacted the Indian Arbitration Act in the year 1899. This Act was substantially based on the British Arbitration Act of 1899. It was the first substantive legislation on the law of arbitration in India, nevertheless, its application was only confined to the Presidency towns viz, Calcutta, Bombay and Madras. It expanded the area of arbitration by defining the expression 'submission' to mean 'a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not.'

"Prior to that, the expression submission was confined only to subsisting disputes. Thus, before the legislation, a contract to refer disputed matters to arbitration, was governed by the three statutes namely, (a) The Indian Contract Act; (b) The Code of Civil Procedure; and (c) The Specific Relief Act, no contract to refer to existing or future disputes to arbitration, could be specially enforced. However a party who refused to perform, was debarred from bringing a suit on the same subject. In this situation, by and large the courts had to draw sustenance from the common law principles of English Law. Consequently, the law of arbitration was far from satisfactory.

The provisions relating to arbitration, were included in the second schedule of the new Code of Civil Procedure 1908 which repealed the Code of Civil Procedure 1882. The First Schedule to this Code contained provisions relating to the law of arbitration which extended to the other parts of India while the Second Schedule dealt with arbitration outside the operation and scope of the 1899 Act. This Schedule, by and large, related to arbitration in suits while briefly providing arbitration without intervention of a court."

Arbitration (Protocol and Convention) Act 1937

The main purpose of the Act was to give effect to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. This Act applied only to such matters as were considered 'commercial' under the law in force in India.[11] The operation of this Act was based on reciprocal arrangements and it mainly concerned itself with the procedure for filing 'foreign awards', their enforcement and conditions of such enforcement. The Rules framed by the High Courts provided details in respect of the proceedings under the Act.[12]The provisions of this Act has now been amended and consolidated in the Arbitration and Conciliation Act of 1996 in the part II, Chapter 2.

The Arbitration Act of 1940

The judicial reprimand as well as clamor of the commercial community led to the enactment of a consolidating and amending legislation viz, The Arbitration Act of 1940. This Act purported to be a comprehensive and self-contained Code. Its provisions are summed up as under:

(A) It made provisions for-

(a)Arbitration without court-intervention;

(b) Arbitration in suits i.e. Arbitration with court intervention in pending suits;

(c) Arbitration with court-intervention, in cases where no suit was pending before the court. It then proceeded to make further provisions, common to all.

(B) It defined the 'written agreement' to mean 'written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. In other words, in the absence of a 'difference' or an 'agreement' to refer the same to arbitration, there could be no 'arbitration' as postulated by the Act.[13]

(C) It also introduced deeming provisions to include the 'provisions set out in the First Schedule', in so far they were applied to the reference.

(D) This Arbitration Act of 1940 made provisions for protecting the 'agreement' from being vitiated by the mere presence of some lacuna in it.

(E) It empowered the court to remove an arbitrator and the umpire and to substitute for them, with new once's ensuring that the arbitration did not fail by reason of want of diligence or misconduct on their part.

(F) It conferred certain powers on the arbitrators and the umpire to facilitate the effective discharge of their functions.

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[11] Ibid, p10
[12] Ibid, p10.
[13] Ibid, p11.

(G) It empowered the court to deal judicially with the award after it has been filed before it enabling it to pass its judgement, including the discretion to modify, remit or set aside the award. These provisions primarily applied to non-court-intervention cases.

(H) In cases of arbitration with court-intervention, where there was no pending suit, detailed provisions were made relating to the form and manner an application to the court for filing the 'agreement' and also as to an order of reference to the arbitrator appointed by the parties. The Act provided that the arbitration shall proceed in accordance with its other provisions, insofar as they would be made applicable.[14]

(I) In cases of arbitration with court-intervention, where a suit was actually pending in the court, all the interested parties might agree to refer any matter in dispute to arbitration. The Act made detailed provisions as to the appointment of arbitrator and the order of reference. The other provisions of the Act, insofar as they could be made applicable to the arbitration, were made applicable to such arbitration as well.

(J) The Act made general provisions to the effect that the award should be approved by the court by a judgement as to the existence, validity and effect of the awards or of 'arbitration agreement' between the parties to the 'arbitration-agreement' or 'award' and also to make 'application' (not suits) as the basis for approaching that court. The intention was to make explicit that no suit of any kind whatsoever would lie in this behalf.[15]

Post World War (II)

After the end of Second World War, particularly after the Independence in 1947, the trade and industry received a great fillip and the commercial community became more and more inclined towards arbitration for settlement of their disputes, as against court-litigation which involved long delays and heavy expenses.

With increasing emphasis on arbitration there was more and more judicial gist exposing the infirmities, shortcomings and lacunae in the Arbitration Act of 1940. For instance, the provisions of this Act, about the duties and powers of the arbitrators or about the procedure for conducting the proceedings after a reference, were notably inadequate.

The Act was silent about the shortcomings inherent in individual private contracts. The rules providing for filing awards differed from one High Court to another. The lack of provisions prohibiting an arbitrator or umpire from resigning at any time in the course of the arbitration proceedings, exposed the parties to heavy losses particularly where the arbitrator or umpire acted mala fide. The Act did not make distinction

[14] Ibid, p10.
[15] Ibid, p11.

between the 'agreement' made in advance to submit future difference and 'submission' made after a dispute had arisen.[16]

There were no provisions requiring the arbitrator to state reasons for sustaining the award. There was no remedy against a non-speaking award albeit such an award could lead to suspicion and embarrassment.

Law Commission of India on the Act of 1940

The Law Commission of India, in its report dated 9th November 1978, suggested extensive amendment in the Arbitration Act of 1940, taking into account commercial realities and in order to settle the conflicting decisions on various points.

The Supreme Court on the Act of 1940

The Supreme Court of India in the case of Guru Nanak Foundation v Rattan Singh and Sons[17] held that the proceedings under the Arbitration Act of 1940 have become highly technical, accompanied by an unending prolixity at every stage, providing a legal trap to the unwary.

The Foreign Awards (Recognition and Enforcement) Act 1961

According to Lord Mustill the New York Convention was 'the most effective instance of International Legislation in the entire history of commercial law'[18] in which India was a signatory to it. The main purpose of the aforesaid Act was to give effect to the convention.

In the case of Renusagar Power Co Ltd v General Electric[19], The Supreme Court of India delivered a landmark judgement and held that the main purpose of the legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.

The United Nation Commission on International Trade Law (UNCITRAL): Model Law

The General Assembly of the United Nations in December 1996 established the United Nations Commission on International Trade Law for the purpose to promote the International Trade.[20] This body has been described as 'the core legal body within the United Nations systems in the field in order to avoid duplication of efforts and to promote efficiency, consistency and coherence in the unification and harmonization of trade law.

Work carried out by the UNCITRAL

1. The Convention on the limitation period in International Sale of Goods (New York 1974).
2. The United Nation Convention on Contracts for the International Sale of Goods (Vienna 1980).
3. The United Nation Convention on the Carriage of Goods by Sea (Hamburg Rules 1978).

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[16] Tractoreexport v Tarapore Co AIR 1971 SC 1,11.
[17] AIR 1981 SC 2075-76.
[18] Ibid, p13.
[19] AIR 1985 SC 1156.
[20] Ibid, p15

4. The UNCITRAL Arbitration Rules 1976.
5. The UNCITRAL Conciliation Rules 1980.
6. The UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994
7. The UNCITRAL Model Law on International Credit Transfer 1992
8. The UNCITRAL Model Law on Electronic Commerce 1996 and
9. The UNCITRAL Model Law on Cross-border Insolvency 1997.

The History of Drafting The Model Law

The Asian-African legal Consultative committee (AALCC), while considering the UNCTRAL Arbitration Rules 1976, suggested to the United Nations Commission on International Trade Law to 'consider the possibility of preparing a protocol to be annexed to the 1958 United Nation Convention on the recognition and Enforcement of Foreign Arbitral Awards' for the purpose of clarifying a number of points which in its opinion had not been dealt with satisfactory in arbitration.

After one year, The United Nations Commission on International trade law suggested that the points raised by the Asian-African Legal Consultative Committee in its proposal deserves thorough study and consideration. Consequently in 1978, The United Nation Commission on International Trade Law Secretariat (UNCITRAL), The Asian-African Legal Consultative Committee (AALCC), The International Council for Commercial Arbitration (ICCA) and the International Chambers of Commerce (ICC), met for consultative meeting, where the participants were of the 'unanimous view that it would be in the interest of International Commercial Arbitration if the United Nation Commission International Trade Law would initiate steps leading to the establishment of uniform standards of arbitral procedure.[21]

Travaux Preparatories

The United Commission on International Trade Law adopted a set of guidelines in the year 1982, making recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules1976. The object of this was to assist the states who had adopted these Rules or a modified version of them.

Draft Model Law

The Model Law on International Commercial Arbitration is designed for the use in all legal and geographical regions. It is the result of guidelines provided in the Travaux Preparatories. On 21 June 1985, the full context of the Model Law on International Commercial Arbitration was adopted by the United Nation Commission International Trade Law (UNCITRAL). The General Assembly of the United Nation recommended to all the states throughout the world to enact modern arbitration legislation based on the Model Law. This is remarkable legacy given by the United Nations to the 'International

[21] Ibid, p15-16.

Commercial Arbitration' which has particularly influenced the Indian Law. These guidelines have since been codified in the Arbitration and Conciliation Act 1996.

General Assembly, in its Resolution, recommended to the member states of the United Nation the implementation of the 'Model Law on International Commercial Arbitration' the Model Law as drafted by the United Nation Commission on International Trade Law.

UNCITAL represents the remarkable result of four years of drafting with the object of creating a set of provisions on the topic of International Commercial Arbitration, which can be directly inserted into any given legislative system worldwide. However, the General Assembly's Resolution clearly represents only the half mark of the Model Law's history, as not only has this law undergone a turbulent drafting process, by its adoption into the almost fifty jurisdictions from around the world has in parts been even more adventurous[22]

General Assembly Resolution

"The General Assembly of the United Nation adopted the following Resolution on 11th December 1985:

The General Assembly, Recognizing the value of arbitration as a method of settling disputes arising in International Commercial relations. Being convinced that the establishment of a model law on arbitration that is acceptable to the states with different legal, social and economic system contributes to the development of harmonious International economic relations.

Noting that the Model Law on International Commercial Arbitration was adopted By the United Nation Commission on International Trade Law as its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration.

Being convinced that the Model Law, together with the convention on the recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nation Commission on International Trade Law recommended by the General Assembly in its Resolution 31/98 of 15 December 1976, significantly contributes to the establishment of the unifies legal framework for the fair and efficient settlement of disputes arising in International Commercial relations.

1. Request the Secretary-General to transit the text of the Model Law on International Commercial Arbitration on the United Nation Commission on International Trade Law together with the travaux preparatories from the eighteenth session of the Commission to government and to arbitral institutions and other interested bodies, such as Chambers of Commerce.

2. Recommends that all state give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedure and the specific need of International commercial arbitration practice."

[22] Ibid, p20.

Provisions of Model Law and its adoption in India

In India, with the exception of few significant variations, the Model Law has almost been adopted in its entirety, in the Arbitration and Conciliation Act 1996.

The Act adopts the following provisions from the Model Law:

i) The definition and form of the arbitration agreement;

ii) The duty of the judicial authority to refer the parties to arbitration where an action is brought before it in breach of the arbitration agreement;

iii) The power of the tribunal and of the court to grant interim measures of protection in support of an arbitration;

iv)The composition of the arbitral tribunal;

v) Appointment of Arbitrators;

vi) Grounds of Challenge to an arbitrator;

vii) Procedure to challenge an arbitrator;

viii) Termination of the mandate of an arbitrator for failure or impossibility to act[23]

ix) Substitution of an arbitrator on termination of his mandate;

x) The competence of the arbitral tribunal to rule on its own jurisdiction;

xi) Procedure of arbitration;

xii) Finality and enforcement of the award and appeal against the arbitral awards[24]

Arbitration and Conciliation Act, 1996

"The law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th day of January, 1996. It extends to the whole of India except the State of Jammu and Kashmir. The Act is of consolidating and amending nature and is not exhaustive. But it goes much beyond the scope of its predecessor the 1940 Act. It provides for domestic arbitration, international commercial arbitration and also enforcement of foreign awards. It also contains the new feature on conciliation. It proceeds on the basis of the UN Model Law so as to make our law accord with the law adopted by the United Nations Commission on International Trade Law (UNCITRAL)"

Purpose of the Act

The purpose of the Arbitration and Conciliation Act, 1996 was as follows;

An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.[25]

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[23] Ibid, pp-21-22.
[24] Ibid, p22.

Constitutional validity of the Act

According to Article 51 (d), the state has to endeavor to encourage settlement of international disputes by arbitration.[26]

The constitutional validity of this Act has been upheld by the Supreme Court in Babar Ali v Union of India[27]. In view of judicial review being available for challenging the award in accordance with the procedure laid down in the Act, the court said that there is no question of the Act being unconstitutional.

Shortcoming of the Act, 1996

Section9:

This section may be misused by the party because may not take the initiative to have the arbitral tribunal constituted, after obtaining an interim measures and may delay the process.

Section 14:

This section state that the mandate of an arbitrator shall terminate but after termination who (party) will pay the arbitrator for the services he rendered in the proceeding and what will be the quantum of fees.

Section 15:

This section is related with appointment of the substitute arbitrator after termination of the mandate under section 14. But there is nothing written in this section that could say that within what time the substitute arbitrator shall be appointed.

There is no provision that could enable the arbitrator to give the award quickly. The Arbitration Act was enacted with the sole purpose to provide speedy settlement of dispute. Nowadays the proceeding takes four to six years average for settling the dispute. Thus, the object of the Act is not achieved till now.

The aggrieved party has to start again from the district court for challenging the award.

There is no provision in the Act as to enable the court to give the judgement quickly where the applications are filed for setting aside the arbitral award.

Arbitration and Conciliation (Amendment Ordinance) 2015

The latest amendment to the Act of 1996 brought about significant changes especially it attempts to curtail the power of judicial intervention in the matters of arbitration and to deal with other lacunas leading to inordinate delay with arbitration related court actions.

Key Amendments

Applicability

"The amendments affirm the line of distinction between purely domestic arbitration involving Indian parties ("Domestic Arbitration"), arbitrations having an international element but seated in India

[25] Dr. Avtar Singh, Law of Arbitration and Conciliation, Eastern Book Company-Lucknow, Eighth edn,2007,P1..
[26] Prof. MP Jain, Indian Constitutional Law, Wadhwa and Company-Nagpur,Fifth edn 2003, Reprint 2008.
[27] Supra note2.P31.

("International Arbitration"), and arbitrations seated outside of India ("Foreign Arbitration"). The provisions of the Arbitration and Conciliation Act 1996 ("Act") (other than Part II of the Act dealing with enforcement) are normally not applicable to Foreign Arbitrations, except where specifically provided.

The Ordinance clarifies that an arbitration would be a Domestic Arbitration even if one of the parties to the arbitration has its central business and management outside India. This amendment affirms the ruling of the Supreme Court in TDM Infrastructure and affords primacy to the place of incorporation of a company."[28]

- Reference to Arbitration

The Ordinance now permits "any person claiming through or under" a party to the arbitration to seek reference of a dispute the subject of an arbitration agreement to arbitration. This clarifies a string of slightly inconsistent rulings of the Indian courts and provides that even non-signatories to an arbitration agreement may be able to seek reference to arbitration under appropriate circumstances.

- Appointment of Arbitrators

"The Ordinance also clarifies that the power to appoint arbitrators can be delegated by the Supreme Court or the High Court to any person or institution. This is an important statutory recognition of the role of institutions in arbitral proceedings.

The Ordinance requires the courts to aim to dispose of an application for appointment of arbitrators within 60 days from the date of service of notice to the other party.

The Ordinance also clarifies the grounds available to challenge appointment of arbitrators on grounds that the appointment raises justifiable doubts as to his/her impartiality or independence. The amended Act contains two schedules that list various grounds for challenge which appear to be heavily influenced by the IBA Guidelines on Conflict of Interest in International Arbitration."[29]

- Court Assistance to Arbitration

"The Ordinance now clarifies that the courts' power to grant interim relief in aid of arbitration is available prior to initiating arbitration, provided the parties actually initiate arbitration within 90 days from the date of obtaining interim relief from the court. This is in contrast to recent decisions in other countries where courts have recognised the courts' power to grant interim relief even if arbitration is not in contemplation.

The Ordinance also clarifies that the courts' power to order interim relief is only available if the arbitral tribunal is not in a position to grant efficacious interim protection.

[28] Vikas Mahendra, Arbitration in India: A New Beginning, http://kluwerarbitrationblog.com/2015/11/06/arbitration-in-india-a-new-beginning/?, May 15, 2017.

[29] Ibid.

Significantly, the Ordinance makes interim orders granted by arbitral tribunals enforceable in Indian courts. This amendment will give more teeth to arbitral tribunals' orders and minimize the need to approach courts to obtain an enforceable order."

- Conduct of Arbitrations

"A controversial provision in the Ordinance is the requirement for arbitrations to be completed within 12 months. Parties are free to agree to extend this period by up to 6 months. Any further extension can only be sought by making a court application. In such proceedings the court has the power to replace recalcitrant arbitrators, impose penalties by reducing arbitrators' fees and impose exemplary costs on parties. The Ordinance requires the courts to endeavor to decide such applications within 60 days. Mandatory stipulations of this nature, which do not account for differences in the complexity of arbitrations are likely to attract criticism. Further, the requirement to approach the courts to seek an extension in each case is likely to increase court interference."[30]

This amendment permits party to go for fast track arbitration, wherein the arbitrator has to render the award within a period of 6 months from the date on which he/she has been appointed.

Setting Aside and Enforcement

"The scheme of the Ordinance confirms the principle laid down in Bharat Aluminum, which clarified that Indian courts do not have the power to set-aside awards rendered in Foreign Arbitrations.

The Ordinance also narrows the scope of the public policy ground for setting aside arbitral awards and challenging enforcement to circumstances where the making of an award is vitiated by fraud or corruption the award violates the fundamental policy of India and the award is opposed to basic notions of justice or morality. The Ordinance further clarifies that the court cannot review an award on merits while considering whether the award is opposed to the fundamental policy of India.

The Ordinance specifically provides that patent illegality as a ground for setting aside awards will only be available for Domestic Arbitrations. Even here, the Ordinance provides that an award may not be set aside merely on grounds that the tribunal erroneously applied the law or by re-appreciating evidence.

In a further bid to avoid frivolous challenges, the Ordinance provides that an application to set aside an award would not automatically stay enforcement. The Ordinance further provides that where payment of money is the subject of an award, stay on enforcement shall be granted only upon furnishing the sums in dispute as deposit or by furnishing sufficient security."[31]

[30] Ibid.
[31] Ibid.

COMMERCIAL COURT'S ACT 2016

"Section 10(1) and (2) of the Act provides that where the subject matter of an arbitration is a Commercial Dispute of a specified value then for all applications or appeals arising out of such arbitration (international commercial arbitration or otherwise) under the provisions of the Arbitration and Conciliation Act, 1996 shall be heard and disposed off by the Commercial Appellate Division of the said High Court.

Arbitration matters, involving a Commercial Dispute of subject matter of value of more than Rs.1,00,00,000, including applications or appeals arising out of such arbitration is to be heard and disposed by the - (i) Commercial Court, in case of matter, which would ordinarily lie before any principal civil court; or (ii) Commercial Division of the High Court, in case of matter which would ordinarily lie before the original jurisdiction of the concerned High Court.

In view of the Arbitration and Conciliation Act, 1996, (as Amended), all matters pertaining to international commercial arbitrations involving disputes of subject matter of value of more than Rs.1,00,00,000, have been brought within the ambit of the High Courts and thus such matters pertaining to international commercial arbitrations are to be heard and disposed by the Commercial Division."

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