

Expanding Scope of Arbitration

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Abstract

Globally the Alternative Dispute Resolution System is adopted, followed and practiced especially in commercial and contractual transactions. In Indian scenario this system found acceptance and recognition in the last two decades. In view to promote commercial activities, this system is more feasible and less cumbersome. ADR comprises of various components such as Arbitration, Mediation, Negotiation, Conciliation and Collective Bargaining.

Arbitration has become popular for a long time which has a long history since the Ancient Roman Commercial Trade Development Period. Until today, arbitration is still so welcomed since it has some advantage that litigation does not have, for example, privacy and efficiency. Arbitration is a substitution by consent of parties, of a domestic tribunal for the tribunal provided disputes. Although arbitration awards are meant to be final, some judicial review remains a vital part of the arbitration process. Yet the question still remains same that: What is the proper scope of judicial review of arbitration awards?

The aim is to give a comparative study about expanding scope of arbitration and this paper is divided into four sections with first section giving introduction and definition of what is arbitration, second part discusses the origin and development of arbitration in India, third is dimensions of online arbitration in India along with difficulties, advantages and legal complexities, fourth is Scope of judicial review of arbitration awards and expanding scope of arbitration and conclusion.

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Introduction

Alternative Dispute Resolution (ADR) machinery is an effective tool to the aforesaid judicial deed like situation. It is a process for settlement of disputes without going through the strict procedure of the court of Law. This system is more economical and speedy in comparison with the process of the court of Law. ADR mechanism is recognized and practiced throughout the world. Especially in Apex Countries like the U.S.A., U.K. and Canada etc. these countries holding the dominant position in the field of ADR system. In the present scenario, it is to be stated that about 2.5 Crores cases in trial courts, 50 lakhs cases in the High Courts and about 50 thousand cases in the Supreme Court are pending and awaiting its adjudication. Sometimes it is noticed that third or fourth generation of the original litigants is contesting the cases at present sued by the ancestors.

In India, there are following methods for settlement of disputes outside the courts. They are:

1. Mediation
2. Conciliation
3. Arbitration
4. Negotiation

Besides specific provisions have also been made in Section 89 of the Code of Civil Procedure, 1908 through Amending Act 46 of 1999 (with effect from July 01, 2002) for the settlement of dispute outside the court.

Arbitration

Arbitration is a legally sanctioned ADR. In fact, it is a coded statute which deals with the settlement of disputes mainly commercial and civil disputes through arbitration, on the basis of consent of parties or by the order of court, arbitration is appointed to make award in form in form of settlement according to the arbitration agreement entered in to by the parties. Third party plays the role of presiding officer of the court in the arbitration process.

The word “arbitration” has not been clearly defined in Arbitration and Conciliation Act, 1996 as well as in the Arbitration Act, 1940. Section 2(1) (a) of the Arbitration and Conciliation Act, 1996 defines arbitration – “any arbitration whether or not administered by permanent arbitral institution. In the case *Collins v. Collins*,² M.R. Romilly defined arbitration, “Arbitration is a reference to the decision of one or more person, either with or without an umpire, a particular matter in difference between the parties”.

²28LjCh 184; 53 ER 916.

Section 2(1) (a) clarifies that the act covers institutional and *ad hoc* arbitration. This definition is mentioned in clause 9(a) of Article 2 of UNCITRAL (United Nation Commissions on International Trade Law) Model Law. According to that provision the expression “Arbitration” is defined as under-

“Arbitration” is the method by which the parties to a dispute get the issue settled through the mediation of a concurred third individual”.

Advantages of Arbitration Over Litigation

1. Arbitration assures privacy. In a civil court, the proceedings held in front of the public.
2. The arbitration process, the party can choose the arbitrator according to their choice, who can be a specialist in the subject matter of disputes. But the arbitrator resolves the dispute fairly and expeditiously.
3. Both the parties must be aware of the rules governing arbitration process.
4. Arbitrator can view the subject of dispute at any time.
5. Unwanted publicity can be discarded.
6. The process of arbitration is speedier and less costly than law suits.
7. Procedural aspects of law can be avoided.
8. A dispute concerning technical matters like engineering and building contract, or scientific issues, the person expert in those fields can resolve the dispute more efficiently and effectively.
9. Venue of the arbitration can be convenient for both the parties
10. A court case is a high cost. The party or claimant has to pay the advocate fees, process fees, court fees and incidental fees. On the other side, arbitration required few procedural steps and no court fees.
11. A judicial settlement is a confounded procedure. A court needs to take after procedure set down in the Code of Civil Procedure, 1908 and the Rules of the Indian Evidence Act. An arbitrator needs to take the standards of natural justice. The Arbitration and Conciliation Act, 1996 especially communicate that the Arbitral Tribunal oughtnot to be bound by The Code of Civil Procedure, 1908 and The Indian Evidence Act, 1872.

The Arbitration Act, 1940

This act deals with only domestic arbitration. Under this act, the intervention of court is required in all three stages of arbitration: preceding the reference of the dispute to the arbitral council in the length of the proceedings before the arbitral court and after the honor was passed by the arbitral council. Before an arbitral council took the insight of a dispute, court

intervention was required to set the arbitration procedures in movement. The presence of an agreement and of a dispute was required to be demonstrated. During the proceedings, intervention of court was necessary for extension of time making an award. At last, award can be enforced but first it was required to make the rule of the court. This act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned-the parties, arbitrators, lawyers and the courts, it proved to be ineffective.

Types of Arbitration

Ad Hoc Arbitration

At the point when dispute emerged between the parties in course of commercial transaction and the same couldn't be settled friendly by transaction in type of conciliation or mediation, in such case specially appointed assertion might be looked for by the conflicting parties.

Institutional Arbitration

In institutional arbitration there will a prior agreement between the parties regarding the institution in order to resolve the dispute in the course of commercial transaction. This institution did not arbitrate the dispute; there is the arbitrator who arbitrates the disputes by applying the rules of the institution. This is the primary mode of resolution of international commercial disputes.

Statutory Arbitration

In statutory arbitration, consent of the parties is not required and it is binding on the parties as the law of land. If any dispute arises in any particular case it has to be referred to arbitration, the arbitration proceedings are called 'statutory arbitration'.

Contractual Arbitration

Due to the growth of commercial transaction as well as increasing disputes between the parties which are required to be settle amicably. Thus, for the quick settlement of dispute without taking resource of any strict procedural law, the parties involved in commercial transaction choose to incorporate an arbitration clause as part of the agreement to refer their future or disputes to name arbitrator to be appointed by a designated authority.

Domestic Arbitration

Domestic arbitration generally occurs in India. The Arbitration and Conciliation Act, 1996 mention the term 'domestic arbitration' in its preamble and the term 'domestic award' in Section 2(7) read with section 2(2) of the said act. It is to be noted that Article 51(d) of the Constitution of India, 1950 make provision that the state should encourage settlement of International disputes by arbitration, it includes domestic arbitrator.

Fast- Track Arbitration

It is time bound arbitration; this process can be adopted for the settlement of the national as well as international disputes. At present many international and national institutions are engaged in providing arbitration facilities have propounded Fast Track Arbitration Rules and the resolution of dispute is same as ordinary arbitration, except that, in addition to the provision for arbitration, Fast Track Arbitration provides that the conflicting parties have agreed for Fast Track Arbitration i.e. time bound arbitration.

Scope of the Fast Track Arbitration

The matters or disputes, which are settled on the basis of the documents, the technique of the Fast Track Arbitration is the best mechanism in majority of cases. Oral hearings and witnesses are not essential in this process. Only exceptional matter the oral hearings can be held in such arbitration. Fast Track Arbitration is not suitable in cases involving a huge degree of discovering of documents and analysis by experts. Further, matters which require a lengthy appreciation of documents, presentation and numerous submissions, in such cases- this arbitration is not suitable.

Scope of Arbitration Law in India

Due to the growth of trade and commerce and economic liberalization created need for effective implementation of economic reforms. It was notice that old India Arbitration Act, 1940 is not effective enough to meet the present day requirements. In India the enterprises are coming in the field of banking, insurance, electricity, communication, telecommunication etc. there is commercial interaction between India and Foreign countries wherein parties agree or have agreed for arbitration in case of dispute arising out of such commercial activities and the dispute shall be determined and settled in accordance with the Arbitration and Conciliation Act, 1996 and the rules framed there under.

The expression 'commercial' in the context of the Arbitration Law has been observed by the Apex court in *R.M. Investment and Trading Co. Ltd. v. Boeing Company*.³

While constructing the expression 'commercial' in Section 2 of the Act, it has to borne in mind that the Act is formulated and designed to sub serve the cause of encouraging global exchange and advancement thereof by giving quick settlement of dispute arising in such exchange through arbitration and any phase or expression happening in that ought to get a liberal development.⁴

³AIR 1994 SC 1136.

⁴Renusagar Power Co. Ltd. v. General Electric Co., AIR 1985 SC 1156; Koach Navigation v. Hindustan Petroleum Co., AIR 1989 SC 2198.

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For this situation the court held that consultancy rendered by R.M. Venture and Trading co. Pvt. Ltd. to Boeing Company for the purpose of developing commercial activities of sale of Boeing aircrafts is purely 'commercial' in nature, hence; relationship between the two companies with each other is commercial.

In another case *Atiabari Tea Co. Ltd. v. State of Assam*,⁵ the Apex Court has held that such activities such, as exchange of commodities for money or other commodities, carriage of persons and goods by road, rail, air or waterways, contract, postal and telegraph services, banking, insurance and transactions in stock exchange are considered to be commercial interaction within the ambit of Article 301 of the Constitution of India, 1950 which deals with freedom of trade, commerce and intercourse- ' subjects to the other provisions of this part (i.e. Part XIII), trade, commerce and intercourse within the territory of India shall be free'.

All kinds of commercial activities may be arbitral provided there is agreement in this regard between the parties. But in *Kamini Engineering Corporation v. Re Tradition*,⁶ the court held that merely providing technical assistance in electrification of railways did not involve consultancy in to active business and therefore such an agreement could not be interpreted to be commercial in nature as it is outside the extent of term "commercial" in the regards of the Arbitration Act.

Sub-section (2) of Section 7 of the said act provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in form of agreement. Section 7 (3) makes it compulsory that an arbitration agreement shall be in writing. According the section 7(4) of the Arbitration and Conciliation Act, 1996 an arbitration agreement may be contained in the following:

1. Document signed by the parties.
2. An exchange of letter, telex, telegram or different methods of telecommunication
3. An exchange of statements of claim and barriers in which the presence of which gives a record of the agreement; or agreement is charged by one party and not denied by other.

Therefore, it can be said that to come within the scope of the Arbitration Act, there are three essentials-

1. Agreements must be in writing;
2. There must be definite parties;

⁵AIR 1961 SC 232.

⁶ AIR 1965 Bom. 114.

3. Parties must have intention to settle their dispute by way of arbitration.⁷

Role of Judiciary in Arbitration

Section 5 of the Arbitration and Conciliation Act, 1996 provides for limited role of judiciary authority in the matters of Arbitration. The court shall not interfere in any matter relating to the arbitration except those which are provided in Part-I of the said Act. Provisions of judicial intervention in part – I of the act are given below:

1. Power to refer parties to arbitration where there is an arbitration agreement (Section 8).
2. Parties have power to make interim order in subject matter of dispute (Section 9).
3. Power to appoint arbitrators in the event of failure by parties to arbitration agreement. (Section 11).
4. Power to decide on the termination of mandate of the arbitration. [Section 14(2)].
5. Power of assistance in taking evidence. (Section 27).
6. Power to set aside an award (Section 34).
7. Power to enforce arbitral award (Section 36).
8. Power to make order on costs of arbitration in absence of sufficient provision made in award [Section 39(4)].
9. Power of determination of question identifying with insolvency proceedings [Section 41(2)].
10. Power to extend time for reference to arbitration of time-barred future disputes [Section 43(3)].

Section 5 of the 1996 Act is based on Article 5 of the UNCITRAL Model Law.

Section 5 of the Arbitration and Conciliation Act, 1996 provides that no judicial authority shall intervene in reference to matters except as provided under this part. Section 7 of the Act expresses that "arbitration agreement" implies an understanding by the parties to submit to arbitration all or certain disputes which have emerged or which may emerge between them in regard of a characterized lawful relationship, regardless of whether contractual or not. Partnership agreement characterized the lawful connection between the parties. the defendant partners are acting contrary to the terms of the agreement without the written consent of the plaintiff whether they must render accounts are all matters that would come within the parameters of the partnership agreement which has defined the legal relationship. There cannot be a separation in reference to the constitution of the partnership on the other side and

⁷Union of India v. Janki Prasad Agarwal, AIR 1986 All 15.

the disputes arising under the terms of partnership on the other. Partnership agreement is a consolidate contract defining the constitution as well as functioning of partnership; *Asokam v. Jayan*.⁸ There is a clause for reference of the dispute to the arbitrator in the partition deed, the court's refusal to refer the dispute to the arbitrator on the ground that the arbitration clause could be invoked only to disputes connected with the partnership or interpretation of partnership documents was held not justified. Section 5 of the Act 1996 makes it clear that no judicial authority which would include courts can intervene except where so provided in this part. There is remedy provided under the Act the court cannot exercise its suomotu powers which would mean its inherent powers. Act 1996 expressly excludes judicial interference, the court would not exercise the powers under Section 151 of the C.P.C; *AnuptechEquiments Pvt. Ltd. v. Ganapati Co-op. Housing Society Ltd.*⁹

EXCLUSION OF JURISDICTION OF COURT

The court has got no jurisdiction to intervene on the disputes which are excluded from the agreement and the same are included in the arbitration as given in *Mullaperiyar Environmental Protection Forum v. Union of India*.¹⁰

Sections 5, 14, 34 and 37

Under the Act of 1996, there are three sections which basically confer power on the court to intervene in the matter. Section 32 of Act of 1996, in terms of sub-section (1) of section 34 recourse to a court against the arbitral award can be made by an application for setting aside such an award in accordance with the sub-section (2) & (3) of section 34.

Thus a court can intervene in setting aside the award. An award in terms of section 2(c) includes an interim award. Section 31(6) of the Act of 1996 gives that an arbitral court in regard of a claim where it can pass an award can also make an interim award in regard of that claim. The following section confers a power on the court to judicially intercede in Section 37 (2). Section 37(2) makes appeal an order of the Arbitral Tribunal under sub-sec. (2) Or sub-sec (3) of Section 16 or granting or declining to concede between time measures under section 17. The court can mediate likewise on an application under Section 14(2) of the Act of 1996. In other words, a conjoint reading of section 5, section 34, section 37 and section 14(2) of the Act 1996 will show that the court can intervene only in cases covered by section 14,34,37.¹¹

Conclusion

⁸ AIR 1998 Ker 256.

⁹ AIR 1999 Bom 219.

¹⁰,(2006) 3 SCC 543.

¹¹United India Insurance Co. Ltd. v. Kumar Texturises, AIR 1999 Bom 118.

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With the advent of the alternate dispute resolution, there is new way for the people to settle their dispute. This mechanism plays an important role in resolving the dispute; it is cost-effective and less-time consuming procedure. Arbitrations goals are unquestionably best served by ensuring the finality of arbitration award. This is consistent with the bargain the parties have made. The remedy for any flaws in the system is having the parties choose better arbitrators, not to appeal arbitration award. The present status gives us a thought that there is an extreme increment even in this field of law as the general population began understanding the pure concept of this and in addition its viability in the enforceability of law through an alternate point of view with the goal that the term 'democracy' increases substantially more significance in the life of the people as well as in the society. This will considerably reduce the load of the court and providing instant justice at door-step and it remains privacy.