Evolution of Arbitration

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Rapid globalization of the economy, modernization and improvement of socio-economic circumstances has led to an increase in commercial disputes. In many parts of India, there is visible increase in cases for already overburdened courts. In such a scenario there was a need for a mechanism for Alternative Dispute Resolution (ADR). The essence of ADR was introduced in the Civil Procedure Code under section 89 through the Civil Procedure Code Amendment Act, 1999. ADR which includes arbitration, Mediation and Conciliation has gained popularity and became an integral part of commercial contracts. Parties nowadays prefer to opt for arbitration mainly because of its strict timelines as amended vide the Arbitration and Conciliation Act, 2015 and to stay outside the ambit of civil courts.

Defining Arbitration

The term arbitration has not been defined in any statute. Arbitration is a mechanism, wherein, a third impartial individual empowered by the consent of the disputing parties through an agreement adjudicates/resolves/determines the dispute between the parties. The person who is empowered with the duty to resolve the dispute is known as the Arbitrator. There may be one arbitrator or a panel of arbitrators depending on the arbitration agreement entered between the parties.

Arbitration as one of the methods of ADR and is recently gaining considerable importance and also being recognized at the world stage as an instrument for resolution of disputes. Almost all the business enterprises nowadays have an arbitration clause in their contracts.

History, growth and development of Arbitration in India

Arbitration law has its history from time immemorial right back from the medieval, British, post and pre Independence period which 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.

In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community called the panchayat for a binding resolution. The panchayati raj system has found its place in various laws in India.

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others. Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act.

The 1940 Act was general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958). The enactment of the Arbitration and Conciliation Act, 1996 (the 1996 Act) was an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modelled on the lines of the UNCITRAL (United Nations Commission on International Trade Law) Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). Its

primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

The reason behind the enactment of the Arbitration and Conciliation Act, 1996 (Act) being the present legislative enactment of the arbitration law is to come out with such methods which would make arbitral procedure fair, efficient 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.

The arbitration regime in India has witnessed several changes since its inception and continues to evolve constantly. The recent amendments of 2015 and 2019 along with various judicial pronouncements over the last 5 years have contributed significantly to the growth of arbitration as an efficacious alternative to traditional court litigation. Certain areas like institutional arbitration still require some attention, but considering the current trend we can be hopeful that these issues will be resolved sooner than later.

Covid-19 and Arbitration

As the world reels under the challenges brought to the fore by the deadly Covid-19, distinct sectors are being faced with novel issues that are motivating industry participants to adopt creative solutions. Arbitration practice is not an exception. The pandemic has forced the sector to reconceive its path, as conducting an in-person arbitration is no longer feasible.

Arbitration, as an alternate dispute resolution mechanism has revolutionised the dynamics of commercial dispute resolution and is preferred by parties due to several significant factors, such as the flexibility to determine procedures, fixed time-limits, cost efficiency, confidentiality, among other factors. Covid-19 has disrupted the normal court functioning which consequently has compelled practitioners to look for alternative efficient methods to resolve disputes.

Although the Arbitration & Conciliation Act of 1996 is silent on the conduct of arbitration proceedings through video conferencing, Section 19 (2) certainly allows the parties to agree on the procedure to be followed by the Arbitral Tribunal in conducting its proceeding, which includes the use of virtual technology. The Arbitral Tribunal may authorize all parties to the arbitration proceedings to file pleadings through electronic mail and conduct proceedings via video conferences to satisfy social distancing requirements without losing productivity.

Dispute resolutions are ongoing throughout the world and videoconferencing or teleconferencing can be used for a particular purpose like recording testimonies of witnesses, but to implement the same as a rule for conducting the entire arbitration proceedings, specific orders would have to be issued under Section 19 (2) when arbitration proceedings begin. We no longer need to endure the traditional form of arbitration time and cost for such things as manual processes and substantial expenses paid for communication, travelling and conducting court hearings. Many countries have already moved to digital means of arbitration to cut such costs and save time such as USA, UK, Singapore, European Union, Brazil, China, etc.

Key benefits of digital arbitrations include paperless proceedings, remote participation (to protect against an epidemic like COVID-19), enhanced collaboration and increased security for sensitive materials. That’s why technology transformation is very much in need at this time.

It gives us the opportunity to keep going successfully using the technology that allows us to work remotely during pandemics like COVID-19.

Arbitration has emerged as the most preferred platform for quick resolution of disputes especially in the industrial and the corporate realm but because the spread of COVID-19 has yet not been controlled, the lockdown may increase or fluctuate from time to time. We need to appreciate the fact that we are into this new normal life that will continue for a long time.

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