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INTERNATIONAL COMMERCIAL ARBITRATION: AN ULTIMATE REMEDY IN COMMERCIAL OBLIGATION

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ABSTRACT

We live in a global market place. All trade potentially involves disputes and successful trade must have a means of disputes resolution other then force. Two traders in disputes over the price or quality of goods delivered would turn to a third whom they trusted for his decision. In modern world this process is known by the name of arbitration and at international level international commercial arbitration formally steps as a disputes settlement mechanism among the parties. Internationally, arbitration has gained acceptance for its flexibility and adaptability to a parties needs. Arbitration also offers an advantage of judicial neutrality. International commercial arbitration is similar in important respect to domestic arbitration it is a consensual means of disputes resolution, that produces a legally binding and enforceable ruling but due to international character it has many problems in its applicability

INTRODUCTION

When society came in to existence and people interacted with each other, than the origin of their rights gave, birth to the conflict among them. To solve out the dispute among them there was a need of mechanism .In this regard they have started to solve their disputes through third neutral party, whose decision was agreed by both the parties later on it was known by the name of puncha's. The phenomena of development has engulfed within its fold varied aspect of humanity .The wider diffusion of information in commercial era and in the era of globalization and industrialization, when the world is coping with many problems. Commercial transactions are increasing gradually as well as disputes are also increasing .A large numbers of cases are pending. So this situation gives over burden to the judiciary and delayed justice to parties' .To overcome from this situation, we need a costless, convenient and speedy mechanism apart from judiciary.

In that situation International Commercial Arbitration has contributed progressed in commercial field. The mélange of concept like liberalization and consumerism has brought in a schematic change in the outlook of trade and its related concepts booming multilateral, bilateral and transnational treaties and policies has made an inevitable impact across the frontiers. Thus International Commercial Arbitration is consider as an excellent means of setting commercial disputes. Once again lawyers and adjudicating tribunals to primarily international law to determine the proper municipal law applicable in particular relationships .Due to problems and inadequacies associated with this private international law approach, there have been increased international efforts in last few decades towards unifying and harmonizing the rules applicable to some transnational relationship, particularly the rules related to International commerce. Obviously, International Commercial Arbitration is a sprout of Arbitration popularly known as, The Alternative Dispute Resolution Procedure which gained momentum due to efficiency,

speedy and cost effective settlement of dispute over the obscure lengthy and cumbersome court procedure. International Commercial Arbitration has conquered the field of dispute resolution in International business and has become a business itself now. Because in present scenario it has lost the real objects for which it was made.

The diversity of commercial activities has resulted in the growth of various system of arbitration. Which do not make use of court litigation.

Today in Commercial contractual relations developed into relationship rather than being limited to the mere exchange of goods. Corporate activity largely involves implementation of strategies, the required performances of which include many subtle variable that do not always lead themselves at least not naturally to evaluation solely by traditional legal concepts like in construction industries most of the technical disputes are resolved by the technical specialist, engineers and architects. But further due to the international character of the contracts different kind of dispute had been arise. Now the parties by contracting on carefully selected termed. Trade terms and legal rules have shifted the emphasis away from the goods towards the document. Useful trade terms have been developed largely by trade custom.

At International level, international conventions have been developed in an attempt to harmonies the rules relating to international trade law.

The means available for the settlement of international disputes are commonly divided in to two groups. Those considered so for, namely negotiation, mediation and conciliation are termed diplomatic means because the parties retain control of the dispute and may accept or reject a proposed settlement as they see fit. On the other hand, arbitration and judicial settlement are employed when what is wanted is a binding decision, usually on these bases of international law, these are known as legal means of settlement.

Judicial settlement involves the reference o f a dispute to the world. Court or some other standing tribunal, such as European Court of Human rights. Arbitration in contrast requires the parties themselves to set up the machinery to handle a dispute, or series of disputes between them. The importance of arbitration as a means of resolution of business disputes has been on an increase with the advent of globalization and liberalization of trade during last decade. The general assembly of the United Nation has, therefore, recommended that all countries give due consideration to model law on International Commercial Arbitration and Conciliation rules adopted by united nation commission on trade rules and laws i.e.{UNCITRAL}.

The model law and rules make significant contribution to the establishment of a unified arbitral legal frame work and efficient settlement of disputes in International commercial relation, before this, trade world was facing so many problems regarding the resolution of their disputes but after the emergence of International commercial arbitration, up to some extend problems are being resolved worldwide by giving the model law. But this model law provides only a base to the countries to establish their arbitration rules according to their own choice. On the same pattern India made an Act regarding arbitration i.e. Arbitration and conciliation Act 1996, it is a consolidated and amended Act . In this research paper, I have made an attempt to find out the status and applicability of International Commercial Arbitration in commercial obligation. Through doctrinal research, I have examined the problems or hurdles in International Commercial Arbitration. It is a method nurtured by the commercial men and trade associations to resolve trade, commercial or industry disputes, where those within the industry would agree privately to appoint a respected member of the industry to resolve their disputes. It is seen that

the arbitration was almost always an individual with a wealth of experience in the relevant industry as somebody with a background relevant to the technical issues in dispute. Having adopted arbitration as the means to resolve disputes, the parties would generally abide by the decision of the arbitrator and the courts were little involved in mentoring or supervising the process.

Now arbitration has moved closer to litigation and has become less of an alternative to it. In short, arbitration is no longer what it set out to be. In terms of speed and cost, it is true to say that historically, arbitration was quicker and less expensive than litigation. Indeed, that may still be true but only if the parties are prepared to cooperative once the dispute has arisen. In practice such cooperation is unusual. What often happens is that parties to arbitration in general and, unfortunately, their representatives and tribunal often adopt a traditional litigation approach to arbitration requiring detailed pleadings, wholesale disclosure, followed by long and detailed witness statements and lengthy expert reports. This was not the original manner in which arbitration was not conducted nor for what it was designed.

However, arbitration may not always be best alternative. Some of the disadvantages peculiar to international Commercial arbitration are:

1. **Lack of authority to grant specific remedies**: Arbitrators lack the power to grant coercive relief such as permanent injunctions, or order specific performance, or award punitive damages under a tort theory.
2. **Unenforceability for reasons of public policy**: Parties may choose to draft choice of law provisions that allow them to circumvent the laws of the situs. Such awards that result from such provisions may be found to unenforceable against public policy.
3. **Conflict of laws problems**: the inclusion of several legal regimes into the arbitration preceding the issues of private international law for the arbitrator. For instance, an action for arbitration may include law of contract, law of the arbitration agreement, law of situs, law of situs of enforcement, etc. An arbitrator may lack the expertise to address the legal complexities of the proceeding.
4. **Non-arbitrability**: States may decide that certain areas are of exclusive jurisdiction of states courts. Where the arbitral agreement concerns itself with exclusive state jurisdiction, the arbitral agreement is unenforceable and void.
5. **Cost**: Cost may be an issue where parties fail to tailor their proceedings causing unnecessary delays and adding to the expense of the arbitration proceeding. Also, arbitrator fees may be expensive and even more so where a three-arbitrator panel is chosen.

The harmonization and unification of law as to make the national legal regimes in Consonance with each other as Prime objective of UNCITRAL has provided the model Arbitration law. This is with a view to providing for a credible, harmonized, system of rules governing the resolution of Commercial dispute. But still there is need of some provision for unifying and harmonized the disputes, researcher suggest some suggestions.

1. There should not be the single number of arbitrator it should always be minimum three, in International Commercial Arbitration section 10 of Arbitration and conciliation Act 1996 deals with the number of arbitrators. The Parties are free to determine the number of arbitrators.

Provided that such number is not an even number. Failing the determination of number of arbitrators the arbitral tribunal shall Consist of a sole arbitrator. This Section need amendment, there should always be an arbitration consist with minimum number of three or more but it should not be in a single number because a case should always be decided by the majority decision.

2. The seat of arbitration must be fixed Like Consumer forum, Labour Court etc. are fixed, in same manner the seat of arbitrations must be certain or fixed.

3. Reference should be mandatory; number of litigations is pending in the courts. So in each and every cases court should refer the party to the arbitrators. It will solve out the cases easily and without using the complex procedure of the courts, it will provide speedy and cheaper justice to the public. As section 89 and Order 10 Rule I. A,B,C of C.P.C. (Civil Procedure Code) Provides the Provision : That where it appears to the Court that there is a element of settlement, on which parties are agreed than Court will ascertained the provisions of settlement and will send to the Parties for –

(a) Arbitration
(b) Conciliation
(c) Judicial resolution like Lok Adalat.
(d) Mediation

4. Subject matter of arbitration should not be limited to the Commercial matter. Now the question arises that what mattes may be referred to arbitration (a) Civil matters in disputes all matters which may from the subject matter of civil litigation affecting rights, or in other words all disputes between Parties relating to private rights or obligations. Which civil courts may take cognizance with in the meaning of section 9 of civil Procedure Code of 1908, may be referred to arbitration. In Isribai U/S Pevrbia, AIR 1930 Sind 195; 121 court observed: it has been held by a bench of this court that there is no bar to refer to arbitration under the provision of schedule II of the civil Procedure code a suit which relates to personal rights between the Parties, e. or question of marriage which is cognizable by a civil Court.

(b) Pure question of law or a question of law and fact may be referred to decision of an arbitrator.1 So it is suggested that each and every civil cases should refer to arbitration

5. There should be the provision of fixed salary for the arbitrator because arbitrator is an human being and a human nature is, to get more money, he may be corrupt and biased. But if the salary is fixed than chances to be corrupt and bias is less. Specially on international level

It is found that high rate of Arbitration fee demanded by the arbitrators in ad hoc arbitration and indulging in granting free adjournments without valid grounds to prolong the proceeding's there should be a fixed amount or percentage as a salary of the arbitrator.

6. India should become Hub of Arbitration –India should be known as hub of arbitration and it is not possible without establishing the Institutional Arbitration Center in India because in International Commercial Arbitration it is necessary that at least one party should be of foreign but not even an Indian nor a foreigner want to arbitrate his dispute in India because there is a lack of Institutional arbitration centers , for example establishment of {LCIA} London Council of International Arbitration is a good beginning in this regard.

7. Mandatory clauses in each business transaction- Practically it is found that parties are always refuses to include Arbitration clause in a commercial contracts and agreements so in practice,

one clause should be mandatory in each business transaction, that if in future any dispute will arise between them, firstly it should be resolved through arbitration. If arbitration fails to resolve such matter than we can move to the other remedies available.

8. Qualification must be Compulsory – A person, who is appointed as arbitrator must be qualified or should have the knowledge of law because arbitration is not judicial but it is quasi judicial mechanism.

9. Arbitral award should be enforcing with binding force over each and every party.

10. Awareness: - Majority of Indian population is not aware of arbitration for resolution of disputes. Therefore, awareness programs must be undertaken by Indian Council of Arbitration and all Chamber of Commerce in the States. The ICA, FICCI, Assocham and apex chambers should seek Government of India's partnership by impressing upon the need for such programs so that arbitration gets a boost and the pendency of cases in the courts may come down to some extent.

11. Fixed Time Limit-In International Commercial Arbitration to resolve the dispute there should be a fix time limit.

12. Support by Bar Council of India- There should be a whole hearted support by Bar Council Of India by advocating Arbitration as a first step for resolution of disputes and to advise their members to guide the disputing parties to consider arbitration as an alternative for settlement of their disputes.

Conclusion-In conclusion of this research paper it is found that International Commercial Arbitration is a remarkable remedy in commercial obligation but still it can not be the ultimate remedy in commercial remedy in commercial obligation.

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