Evolution of Arbitration in India

"Differences we shall always have but we must settle them all, whether religious or other, by arbitration." - Mahatma Gandhi

The industrial revolution has led to rapid escalation in global trade and commerce. To correspond with the economic growth and avoid prolonged litigation, the parties resort to arbitration as the preferred dispute resolution mechanism. Not only in India but cohesive global growth strategies and economies have realized that arbitration happens to be a favourable way out for all. Cross border transactions and bilateral trade relations have fostered affiliations between countries thereby increasing legal intricacies. Needless to say, disputes have also become inevitable and there is a demand for methodology to expedite legal remedies.

The earliest evolution of arbitration can be traced back to the era when King Solomon during his rule followed the biblical theory when he settled the issue between two mothers where each one was claiming the right on the baby boy and the issue was who the true mother of a baby boy[1] was. Thereafter, arbitration was used by the rulers to settle territorial disputes and also for commercial disputes. According to historical references, arbitration has been in place even before the times of Christ. There has been references that prove the same. For instance, the Arabic word for arbitration is **Tahkeem** and arbitrator is **Hakam.** Similarly, in case of Persian language, an arbitrator is called as **Salis** and the party to same is known as **Salisee**. Moreover, the first law for arbitration came into force in England in the year 1697.

Hindu Law: Glimpse into ancient Arbitration

As per the Hindu Law, one of the earliest known treatise that mentions about arbitration is ***"Brhadaranayaka Upanishad"***[2]. It elaborates about the various types of arbitral bodies which consists of 3 primary bodies namely '*Puga'* the local courts, '*Srenis'* the people engaged in the same business or profession and the *'Kulas'*, who were members concerned with the social matters of a particular community and all these three bodies were cumulatively known as Panchayats. The members of the same

1 en.wikipedia.org/wiki/Hebrew_Bible
2 http://shodhganga.inflibnet.ac.in/bitstream/10603/37584/8/08_chapter%202.pdf

were the Panchas, the then arbitrators, used to deal with the disputes under a system, we now refer to as Arbitration.[3] It has been seen that the disputes which were referred to the Panchas and the courts have been duly recognised and have received credence to the awards passed by them. The same was observed by the Privy Council in the case of *Vytla Sitanna vs. Marivada Viranna*[4].

The Modern Arbitration Law was enacted in India as early as 1772 by Bengal Regulation Act of 1772. This was a result of successful resolution of disputes amongst parties by choosing a tribunal. Thereafter, the same was promulgated to other presidency towns namely Bombay and Madras through Bombay Regulations Act of 1799 and Madras Regulation Act of 1802.

Birth of India's 1st Legislative Council

The 1st Legislative Council for India was formed in 1834, followed by the First Indian Arbitration Act on 1st July, 1899. It came into force and said act was fundamentally based on British Arbitration Act, 1889 but the application of the Indian Arbitration Act was confined only to the presidency towns' i.e Calcutta, Bombay and Madras. A unique feature in the Act was that the names of the arbitrators were to be mentioned in the agreement, the arbitrator at that point can also be a sitting judge, as was in *Nusserwanjee Pestonjee and Ors. v. Meer Mynoodeen Khan Wullud Meer Sudroodeen Khan Bahadoor*[5]. In the case of *Gajendra Singh vs. Durga Kunwar*[6] it was observed that the Award as passed in an arbitration is nothing but a compromise between the parties. In *Dinkarrai Lakshmiprasad vs. Yeshwantrai Hariprasad*[7], the Hon'ble High Court observed that the said Indian Arbitration Act, 1889 was very complex, bulky and needed reforms.

Arbitration Act 1940 – Unveiling Controversies

Under the British Regime a more specific arbitration act was enacted on 11th March 1940, which came into force on 1st July 1940. termed as 'The Arbitration Act, 1940'. It

3 History of Dharmasastra, 1946 Vol. 3 Page 230
4 AIR 1934 PC 105
5 (1855) 6 MIA 134
6 (1925)ILR 47All637
7 AIR 1930 Bom 98

was applied to the whole of India (including Pakistan, Baluchistan)[8]. The same was modified vide an ordinance, post Independence.

The Act of 1940, was referred to many disputes but the same was also under many criticisms. In some of the cases, it was observed that the Arbitration Act, 1940, distinguishes between an application for setting aside an award and one for a decision that the award is a nullity. This implies that it does not legally exist and contemplates that an application for setting aside an award may be made under Section 30 and an application of that award is a nullity under Section 33. Further, it was also observed that the said act fails in recognizing that the arbitration will fail in-case of non-existence and invalidity of an arbitration agreement[9].

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 arbitrators or umpire acted mala fide. It was also seen that if an arbitrator appointed by the Court dies during the arbitration proceedings, there was no other provision in the said act for appointment of a new arbitrator, which was also seen as a major flaw in the 1940 Act[10]. Another concern in the act was that the Marginal Notes were not regarded as part of an Act[11].

Enforcement of the Arbitration Act, 1996

The Arbitration Act of 1940 had been facing a lot of criticisms and lacked in quite a lot of areas when it came to implementation in the real sense. Although it brought uniformity in law across the nation, it needed to be replaced by The Arbitration and Conciliation Act 1996, which came into force from 22nd August 1996. The basic intent of the legislation was to provide for a speedy solution to disputes between the parties and also to limit the judicial intervention. The main intention of the Legislation was primarily to cover the international and domestic commercial arbitration and conciliation. It was also to make the arbitral tribunal fail, provide them reasons to pass awards, minimize the role of courts, enforce the arbitral award as the decree of the court.

8 http://www.wipo.int/edocs/lexdocs/laws/en/pk/pk066en.pdf
9 AIR1956Cal321
10 AIR1963Cal149
11 (1904)ILR 26NULL393

In certain cases, there arose a dispute between the parties and applications were filed before the enactment of the 1996 Act but the arbitrators were appointed after the enactment. In such a given scenario, the arbitrators and the parties also agreed that the proceedings for the said dispute will be governed by the New Law.

The Act of 1996 consolidated and amended laws relating to Arbitration, International Commercial Arbitration and also for enforcement of the Foreign Arbitral Awards. Initially, in the Act of 1996, it was held that the Court can pass interim orders under Section 9 of the Act, where Section 9 contemplates two stages, firstly, court can pass order during arbitral proceedings and secondly, that court can pass order before commencement of arbitral proceedings[12].

The Arbitration Act, 1940 vs. 1996 – Contrasting Scenarios

The basic difference in 1940 and 1996 Act was that in the former one a party could commence proceedings in court by moving an application under Section 20 for appointment of an arbitrator and simultaneously could also move an application for interim relief under the Schedule read with Section 41(b) of the 1940 Act. The later one does not contain any provision similar to Section 20 of the 1940 Act but the court can pass orders even before the commencement of the arbitration proceedings. Another difference was that in the former act, there was no requirement to give reasons for an award until and unless agreed by the parties to arbitration. However, in the later Act, the award has to be given with reasons, which minimized the Court's interpretation on its own. There were changes with respect to the award passed by the arbitral tribunal in the 1940 and 1996 Act.

The 1996 Act since its enactment faced many challenges and the Courts brought out what was actually intended by the Legislation, the Courts clarified the said Act and the intention by various landmark judgments. In particular, the landmark case of Bharat Aluminium Co., saw at least three phases before the Hon'ble Supreme Court of India since the year 2001 till now i.e 2016 carrying from two Hon'ble Judges to the Constitution Bench.

In the first case, the Hon'ble Supreme Court was of the view that Part I is to apply also to international commercial arbitrations which take place out of India, unless the

[12] AIR 1999 SC 565

parties by agreement, express or implied exclude it or any of its provisions, it was also held that the Arbitration Act of 1996 was not a well drafted act and had some lacunas[13].

The Second Round of Amendments in 2005

The second round[14] started around 2005, when there was a difference of opinion between the two Hon'ble Judges of the Hon'ble Supreme Court of India and the said matter was thereafter, placed before a three Judge Bench, which by its order directed the matters to be placed before the Constitution Bench. The Constitution Bench was of the view that Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India and that the Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. The Bench further went ahead with a distinction between the arbitration in India and outside India. It held that Section 2(2) merely reinforces the limits of operation of the Arbitration Act, 1996 to India and it was further held that if Part I of the Act were applicable to arbitrations seated in foreign countries, certain words would have to be added to Section 2(2). The section would have to provide that "this part shall apply where the place of arbitration is in India and to arbitrations having its place out of India."

Another interesting question which was considered was whether Section 2(2) is in conflict with Sections 2(4) and 2(5). It was held that the language as used by the legislature in Sections 2(4) and 2(5) of the 1996 Act, means the arbitration, that take place in India. It was further clarified that the provision does not admit an interpretation that any of the provisions of Part I, would have any application to arbitration which takes place outside India. The 1996 Act, was basically designed to give different treatments to the awards made in India and those made outside India. The distinction is necessarily to be made between the terms "domestic awards" and "foreign awards". It was also clarified that Part I and Part II are exclusive of each other and the same is also evident from the definitions. The issues relating to the interim reliefs in an Inter-Parte Suit filed by the parties pending arbitration was held to be non-maintainable, as the pendency of the arbitration proceedings outside India would not provide any cause of action for a suit where the main prayer is for injunction.

Third Round of Amendments in 2015

[13] AIR2002SC1432, AIR 2008 SC 1061
[14] (2012)9SCC552

The question as to whether part I of the Arbitration and Conciliation Act, 1996 would apply to foreign arbitrations was first examined by the Hon'ble Supreme Court of India in a celebrated judgment by a three Judge bench in the year 2002 titled *Bhatia International vs. Bulk Trading SA1 ("Bhatia International")*. The core issue before Hon'ble Supreme Court was the interpretation of Section 2(2) of the un-amended Act which stated that, "This Part shall apply where the place of arbitration is in India." The Hon'ble Apex Court had compared the said provision with the UNCITRAL Model Law2, which clearly stated in its preamble that, "the provisions of this Law... apply only if the place of arbitration is in the territory of this State."

The Hon'ble Supreme Court of India in the case of *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.3 (BALCO)* had reconsidered the law laid down in Bhatia International and overruled the same. In the landmark judgment pronounced by the Constitution Bench of Hon'ble Supreme Court of India on September 06, 2012 it was concluded that "Part I of the Arbitration & Conciliation Act, 1996 is applicable only to the arbitrations which take place within the territory of India".

The Hon'ble Apex Court had observed as under:

"In our opinion, the provision contained in Section 2 (2) of the Arbitration & Conciliation Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration & Conciliation Act, 1996 is limited to all arbitrations which take place in India".

Only those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India would continue to be governed by the said principle.

Even the world's two most prominent countries (India and Pakistan) also agreed to refer the dispute to Arbitration and had referred the dispute relating to the Indus Water Treaty 1960[15] to The Permanent Court of Arbitration. This move clarified and supported the importance of arbitration globally.

[15] https://pca-cpa.org/en/search/?q=THE+INDUS+WATERS

With the economic growth of the nation, the foreign entities started business through their 100% subsidiaries. Eventually, an exciting question of law came for consideration before the Hon'ble Apex Court[16] which was whether it is permissible under the Arbitration Act, 1996 for two Indian Companies to agree to refer their commercial disputes to a place of arbitration outside India with governing law being English law. It was observed that as one of the entities indirectly involved in the matter is a foreign entity, therefore, there is some foreign element and secondly, as Section 28(1)(b) of the 1996 Act expressly recognizes such autonomy to choose the governing law, therefore the said clause is valid.

The 2015 Act can be looked as a boon for the party who succeeded before the arbitral tribunal, as in the earlier act of 1996 if the award passed by the arbitral tribunal was challenged before the court, even on issuance of notice by the court would tantamount as a stay but by virtue of the amendment in the 2015 Act, a specific stay has to be granted.

It is to be noted that not all matters/disputes can be referred to arbitration even if the agreement/contracts etc. contain an arbitration clause, its being noted that the disputes relating to Trust, trustees and beneficiaries arising out of the Trust Deed and the Trust Act are not capable of being decided by the arbitrator[17].

Focus on the '*Public Policy of India*'

The interpretation of the word "*Public Policy of India*" was sought to be narrowed by the said Amendment with the intention to give importance to the award of the arbitral tribunal and accord finality to the same, which was avowed intention of the 1996 Act. It was also recommended and accepted that the arbitration proceedings have to start within a period of maximum 90 days by the party obtaining any interim order from the court. The amendment also restricted the courts' interference in any arbitration proceedings. By virtue of the said amendments, no application was allowed or would be entertained by any court in a matter where arbitration proceedings had already commenced.

The amendment also confirmed that any interim orders passed by the arbitral tribunal are enforced effectively, as the said interim orders which were passed at the time of 1996 Act were not effectively enforced since the provisions of Civil Procedure Code were not made specifically applicable to them.

Summing Up

[16] 2016 (8) SCALE 225
[17] 2016(8)SCALE116

It is evident that arbitration has evolved over the years as the ideal tool for resolution of disputes that saves the court's time and largely instrumental in assisting the parties to resort to quick remedial measures. Every arbitration is based on insightful application of law and its evolution is proof of its significance in the actual proceedings. Thus, arbitration has emerged as the most preferred platform for quick resolution of disputes especially in the industrial and the corporate realm.

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