ARBITRATION – BEST MODE TO RESOLVE DISPUTES

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Introduction

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time." - Abraham Lincoln, Notes for a Law Lecture (1850).

Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes:

- Arbitration
- Mediation
- Negotiation
- Conciliation

The number of cases to be resolved is piling up at the courts in a maddening way. Besides, the constant rise in the costs of litigation coupled with time delays continues to plague the litigants. As a result of all this, the reliance on ADR methods is on the rise.

The two most common forms of ADR are arbitration and mediation. Arbitration is the settlement of a dispute by the decision not of a court of law but of one or more persons called arbitrators which is executable as a decree of the court. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court. At its core, arbitration is a form of dispute resolution. Arbitration is the private, judicial determination of a dispute, by an independent third party.

According to the Indian Arbitration and Conciliation Act, 1996, "Arbitration" means any arbitration whether or not administered by permanent arbitral institution.

Kinds of Arbitration

1. Adhoc arbitration:

An ad hoc arbitration is one, which is not administered by an institution, and therefore, the parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, procedure for conducting the arbitration, etc. The arbitration agreement, whether arrived at before or after the dispute arises, might simply state that "disputes between the parties will be arbitrated", and if the place of arbitration is designated, that will suffice. If the parties cannot agree on arbitral detail, all unresolved problems and questions attending implementation of the arbitration, for example "how the arbitral tribunal will be appointed", "how the proceedings will be conducted" or "how the award will be enforced" will be determined by the law of the place designated for the arbitration, i.e., the "seat" of the arbitration. Parties wishing to include an ad hoc arbitration clause in the principal contract between them, or seeking to arrive at terms of arbitration after a dispute has arisen, have the option of negotiating a complete set of rules, establishing procedures, which fit precisely their particular needs.

2. Institutional arbitration:

An institutional arbitration is one in which a specialized institution with a permanent character, intervenes and assumes the functions of aiding and administering the arbitral process, as provided

by the rules of that institution. Often in such cases, the contract between the parties will contain an arbitration clause, which will designate an institution as the arbitration administrator.

In institutional arbitration, the first issue arising for agreement of the parties is choice of the institution, appropriate for the resolution of disputes, arising out of their contract. Whilst making such choice, there are various factors to be considered i.e. nature & commercial value of the dispute, rules of the institution as these rules differs, the past record and reputation of the institution and also that the institutional rules are in tune with the latest developments in international commercial arbitration practice. There are many institutional arbitration administrators, some of which are associated with a trade association and many of which are independent.

3. Contractual arbitration

In the present scenario, where the numbers of commercial transactions as well as the number of disputes are increasing, the parties entering into a commercial transaction prefer to incorporate an arbitration clause in their agreement. The arbitration clause provides that if in future any dispute arises between the parties they will be referred to a named arbitrator/arbitrators.

4. Statutory arbitration

If by operation of law the court provides that the parties have to refer the matter to arbitration it is termed as statutory arbitration. In this kind of arbitration the consent of the parties is not required. It is more of a compulsory arbitration and it is binding on the parties as the law of the land.

5. International Commercial Arbitration

International commercial arbitration is the arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India where at least one of the parties is:

- An individual who is a national of or habitually resident in any country other than India.
- A body corporate which is incorporated in any country other than in India.
- A company or an association or a body of individuals whose central management and control is exercised in any country other than India.
- The government of a foreign country.

6. Foreign Arbitration

When arbitration proceedings are conducted in a place outside India and the Award is required to be enforced in India, it is termed as Foreign Arbitration.

Disputes which can be referred to arbitration

Generally speaking, all disputes of a civil nature or quasi-civil nature, which can be decided by a civil court, can be referred to arbitration. Thus disputes relating to property, right to hold an office, compensation for non-fulfillment of a clause in a contract, disputes in a partnership etc. can be referred to arbitration. Thus disputes arising in respect of defined legal relationship, whether contractual or not, can be referred to Arbitration.

It is necessary that there is a defined legal relationship between persons, companies, association of persons, body of individuals etc. created or permitted by law, before a reference can be made to arbitration.

However, the relationship may not be a contractual one. A dispute may arise out of quasi contracts; e.g., the division of family property. The same may be validly referred to Arbitration.

Disputes which cannot be referred to arbitration

Section 2(3) of the Indian Arbitration and Conciliation Act, 1996 provides that: — This part shall not affect another law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

Thus if a matter is governed by any other law which excludes reference to Arbitration, this Act will not apply. Since in those cases, the law has given precise jurisdiction to specified courts or tribunals only, those cases cannot be decided through the mechanism of Arbitration. The following matters in general practice, are not arbitrable.

1. Insolvency matters; e.g., adjudication of a person as an insolvent
2. Matrimonial causes (except matters pertaining to settlement of terms of separation or divorce)
3. Testamentary matters; e.g., validity of a will
4. Pertaining to suit under section 92 of the Code of Civil Procedure, 1908
5. Pertaining to proceedings for appointment of guardian of a minor or lunatic person
6. Pertaining to industrial disputes
7. Pertaining to criminal proceedings [excepting matters relating to compoundable offences]
8. Relating to charities or charitable trusts
9. Pertaining to dissolution or winding up of a company incorporated and registered under the provisions of the Companies Act, 1956 (Haryana Telecom Ltd. vs. Sterlite Ind. Ltd.) 1999 (4) L.J. (S.C.) 389.
10. Relating to claim for recovery of octroi duty.
11. Pertaining to title to immovable property in a foreign country.
12. Relating to possession of leased premises governed by the provisions of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947.

However, the above is not an exhaustive list.

Advantages of arbitration over litigation

Arbitration carries a number of advantages over usual method of dispute resolution of redressal through a court of Law. Courts in India are already burdened with the pending litigation before it which naturally increases the time frame for the disposal of a dispute before a court.

1. Arbitration promises privacy. In a civil court, the proceedings are held in public which may embarrass the parties, especially during cross-examination.
2. Arbitration provides liberty to choose an arbitrator, who can be a specialist in the subject matter of the dispute. Arbitrators who are sector specialists can resolve the dispute fairly and expeditiously as they are well versed with the usage and practices prevailing in the trade or industry.
3. The venue of arbitration can be a place convenient to both the parties. It need not be a formal platform. A simple office cabin is enough. Likewise the parties can choose a language of their choice.
4. Even the rules governing arbitration proceedings can be defined mutually by both the parties. For example, the parties may decide that there should not be any oral hearing.
5. A court case is a costly affair. The claimant has to pay advocates, court fees, process fees and

other incidental expenses. In arbitration, the expenses are less and many times the parties themselves argue their cases. Arbitration involves few procedural steps and no court fees.

6. Arbitration is faster and can be expedited. A court has to follow a systematic procedure, which takes an abnormally long time to dispose off a case. It is a known fact that millions of unresolved cases are pending before the courts.
7. A judicial settlement is a complicated procedure. A court has to follow the procedure laid down in the Code of Civil Procedure, 1908 and the Rules of the Indian Evidence Act. In arbitration, the procedure is simple and informal. An arbitrator has to follow the principles of natural justice. The Arbitration and Conciliation Act, 1996 specifically states that the Arbitral Tribunal shall not be bound by The Code of Civil Procedure, 1908 and The Indian Evidence Act, 1872.
8. Section 34 of the Act provides very limited grounds upon which a court may set aside an award. The Act has also given the status of a decree for the award by arbitrators. The award of the arbitrators is final and generally no appeal lies against the award. While in a regular civil suit there maybe an appeal and an appeal against an appeal.
9. In arbitration, the dispute can be resolved without inflicting stress and emotional burden on the parties which is a common feature in court proceedings.
10. In a large number of cases, 'Arbitration' facilitates the maintenance of continued relationship between the parties even after the settlement.

It can be concluded that Arbitration is a mode of resolving disputes with minimum interference of the court and comparatively a much faster mode of dispute resolution.

Acts Rules & Provisions applicable

- Indian Arbitration and Conciliation Act, 1996
- UNCITRAL Conciliation Rules in 1980
- Model Law on International Commercial Arbitration adopted by UNCITRAL in 1985
- United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 - ratified by more than 140 countries

Major Institutions and Bodies

- International Chamber of Commerce (ICC)
- JAMS International
- British Columbia International Commercial Arbitration Centre (BCICAC, Canada)
- International Centre for Alternative Dispute Resolution (ICADR)
- International branch of the American Arbitration Association
- London Court of International Arbitration (LCIA)
- Hong Kong International Arbitration Centre
- Singapore International Arbitration Centre (SIAC)
- Specialist ADR bodies like World Intellectual Property Organisation (WIPO), which has an arbitration and mediation center and a panel of international neutrals specialising in intellectual property and technology related disputes
- International Arbitration Institute
- Association for International Arbitration (AIA)