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OVERVIEW ON INTERNATIONAL COMMERCIAL ARBITRATION

We have witnessed significant growth in foreign commerce and investment in recent years. Cross-border commercial disputes are increasing in tandem with increased international trade and investment. Every human community has a legal system for resolving disputes and every aggrieved individual is required to seek remedy in the courts. All legal systems strive to achieve the legal ideal that there must be a remedy for every injustice, so that no one may take the law into their own hands. The number of litigants in the courts has increased dramatically.

International arbitration has evolved as the preferred choice for settling cross-border commercial disputes and maintaining corporate ties, owing to the requirement for an expedient dispute settlement system. International business conflicts involving Indian parties are rapidly increasing as a result of an infusion of foreign investments, overseas commercial transactions, and open-ended economic policies. **Arbitration** is a nonjudicial legal procedure for settling conflicts that involves sending them to a neutral third party for a binding judgement, or "award." An arbitrator can be a single person or a group of three people called an arbitration board. Arbitration is now a widely used method of resolving economic disputes on a national and worldwide scale. It's no exaggeration to claim that there isn't a single industry that doesn't use arbitration. In this context, commercial arbitration as a way of resolving business disputes has grown in importance in the twenty-first century. The only genuine alternative to judicial adjudication is the basis for its phenomenal popularity and worth. As a result, the role and intervention of courts in the arbitration process have been minimized.

The arbitration may be divided into two types: ad hoc and institutional. Institutional arbitration is one that is entrusted to one of the main arbitration institutions, whereas ad hoc arbitration is one that is performed independently and according to the norms set out by the parties and their attorneys. Ad hoc arbitration appears to be less expensive and more flexible on the exterior. Institutional arbitration, on the other hand, offers an independent, unbiased set of norms that already exist, and it needs an institution to provide services that are important to the efficient operation of the arbitration.

Origin of Arbitration:

The genesis of arbitration in the United States began in 1987 when the Chambers of Commerce of New York State established the first privately administered commercial tribunal. In 1920, New York passed the first modern arbitration legislation, which was followed by the federal government in 1925 and more than a dozen states after that. However, the locations covered were diverse.

Elements of the definition of Arbitration:

The principal characteristics of Arbitration are:

- arbitration is a mechanism for the settlement of disputes
- arbitration is consensual
- arbitration is a private procedure
- arbitration leads to a final and binding determination of the rights and obligations of the parties

- **Arbitration is a mechanism for the settlement of disputes:**

There can be no arbitration if there is no dispute. It is normal for the parties to resolve their dispute after the arbitration has begun, just as it is in litigation. There is no longer any dispute for the arbitral tribunal to examine after the parties have reached an agreement to settle the dispute.

- **An Arbitration is consensual:**

Settles only disputes submitted to it-

The parties' agreement must constitute the basis for the arbitration. Not only does this imply that they must have agreed to have their issue arbitrated, but it also implies that the arbitral

tribunal's jurisdiction is restricted to what the parties have agreed upon. As a result, the tribunal's judgement must resolve the disagreement that was brought before it and must not address any additional concerns or conflicts that may have developed between the parties.

Semi-consensual-

Arbitration is usually only semi-consensual in most situations. The majority of arbitration agreements are written as arbitral provisions in the main contract. The arbitral provision will allow for the resolution of any future disputes that may arise. If a disagreement arises, the parties may no longer agree that it should be resolved by arbitration.

- **Arbitration is a private procedure:**

Not part of State system of dispute settlement-

Arbitration is not a component of the legal system of the country. It is a method based on the parties' mutual consent. Nonetheless, it serves the same purpose as traditional litigation in state courts. The final result is an award that may be enforced by the courts, generally in the same or similar way as a court decision can be enforced. As a result, the State has an interest in the conduct of arbitration in addition to its interest in resolving conflicts through other procedures that are also alternatives to litigation. As a result, several governments have imposed severe controls on arbitration in the past. The fact that arbitration legislation is contained in the Code of Civil Procedure in many nations demonstrates the strong relationship between arbitration and litigation.

By exercising their power to set aside an award or refuse to recognize or enforce it, the courts can ensure that the appropriate procedure is followed in the arbitration.

Confidentiality-

As international commercial arbitration was typically between two commercial companies that might have resolved their disagreement by discussion or other private and confidential means, it became almost a certainty that the private nature of arbitration also meant confidentiality. The parties, arbitrators, witnesses, experts, and any other supporting personnel agreed not to divulge anything about the arbitration, including its existence. If one of the parties needed the assistance of a court concerning the arbitration or to set aside or enforce an arbitral judgement, there was an obvious exception.

- **Arbitration leads to a final and binding determination of the rights and obligations of the parties:**

Many arbitration rules, such as ICC Arbitration Rule 28(6), specifically provide that

"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay …."

It is not essential for the arbitration rules to specifically state this. Arbitration is not a procedure that does not result in a final and binding determination of the parties' rights and obligations.

Difference between domestic arbitration and "international" arbitration:

Arbitration, according to current understanding, is controlled by the legislation of the jurisdiction in which it takes place. As a result, every arbitration that takes place within a State is a domestic arbitration within that State. Many countries, on the other hand, distinguish between domestic and international arbitrations. One of the implications might be that the types of disputes that can be brought to arbitration in an international arbitration differ from those that can be filed in domestic arbitration. Domestic and foreign arbitrations are governed by distinct legislation in several countries. It is a subject of national law to distinguish between domestic and international arbitrations.

Definition of international arbitration:

An international arbitration might be defined in two ways. One is to analyze the transaction itself: does it include a transaction that occurs in a state other than the arbitration jurisdiction or in two or more states? Another way is to look at the parties and see whether they are from different states.

Natural persons-

Two natural individuals who are citizens of separate countries are typically regarded to be from distinct countries. However, even though he is a citizen of another country, a long-term resident of a country may be deemed a citizen of that country for the purposes of deciding whether an arbitration is international.

Juridical persons-

Similarly, a juridical person is frequently regarded to be a citizen of the state in which it was organized. If the legal entity in question is a completely or substantially owned subsidiary of a foreign natural or legal entity, the subsidiary may be regarded to have the parent's nationality.

Why do parties choose international commercial arbitration?

The reasons why parties select international commercial arbitration to resolve their disputes may be divided into two categories: reasons that apply to all arbitrations and reasons that are particular to international arbitrations.

Arbitration in general-

Arbitration allows the parties to select someone with specialized knowledge to adjudicate their disagreement. State court judges are less likely to acquire the same level of technical competence in the transactions that come before them as lawyers who represent the parties and may subsequently serve as arbitrators in similar transactions. It is a requirement in many trades where arbitrations are conducted by trade associations that the arbitrators have a minimum period of experience in the trade in question. States with restrictive arbitration laws that only allow lawyers to serve as arbitrators do not have the option of selecting arbitrators with specialized knowledge.

Specific dispute-

For a given dispute, arbitrators are chosen. Whether the arbitral tribunal is made up of a single arbitrator or a panel of three, the tribunal is involved in the arbitration from beginning to end. The arbitrators might get well acquainted with the subject of the dispute as a result of the procedure's consistency. In many legal systems, on the other hand, distinct elements of the issue will be addressed by separate judges, who may never become acquainted with the entire case.

The arbitration procedure is adaptable and may be tailored to the demands of the specific dispute. Most modern arbitration rules leave the specifics of the procedure to the parties' agreement or the arbitral tribunal, with the sole condition that all parties be treated equally and that each party is given a full opportunity to state his case. Although procedural flexibility is especially important in international commercial arbitration, where the parties and their

lawyers may have widely divergent expectations about the procedure to be followed, it is equally beneficial in domestic arbitrations.

No appeal-

On the merits, arbitration is not appealable. What the parties lose in legal certainty due to the tribunal's inability to remedy errors in the application of the law, they gain in terms of the amount of time and money it takes to obtain a final ruling.

Faster and cheaper-

One of the main arguments in favor of arbitration has been that it provides faster decisions and lower costs than litigation in the courts. For smaller disputes, many arbitration rules provide for a more accelerated approach. On the other hand, if the parties choose to litigate the matter using every procedural tool at their disposal, the expenses in arbitration will be just as high as they would be in litigation.

Disadvantages of Arbitration in general:

In the arbitration procedure, there are certain drawbacks. It has been difficult to create rules for the conduct of commercial interactions in Anglo-American practice since arbitrators are typically not required to offer any explanation to accompany an award. Furthermore, the arbitral judgement is less foreseeable as a result of the ambiguity. Divergences in municipal legislation and court judgments that result in various interpretations of comparable arbitration questions, as well as the fact that awards are rarely published, are further barriers to greater use of commercial arbitration.

International commercial arbitration:

Litigation in one's own courts is the most advantageous position for a party to a disagreement in an international commercial transaction. Even if the courts are perfectly impartial, that party is litigating at home with its usual lawyers, following a well-known method, and in its own language.

Litigating in foreign court-

While this is advantageous to one party to the transaction, it is disadvantageous to the other, who must litigate in an unfamiliar method, in a language that may or may not be the contract's language, and without the ability to utilize its own lawyers who are familiar with the company. It's also not insignificant that one party is staying at home while the other is staying in a foreign country, with all the associated difficulty and expense.

Arbitration reduces inequalities-

Arbitration of such disputes is one way to eliminate disparities. While the arbitration can be conducted by an arbitration organization in one of the parties' home countries, it can also be conducted by an arbitration organization in a third nation. In addition, several arbitration bodies will conduct arbitrations all around the world. Leading arbitration companies compete fiercely to provide their services all over the world.

When State is a party-

When the state is a party to the dispute, there are specific concerns regarding the courts' impartiality. For foreigners to feel safe suing against the state in its own courts, the state has far too many levers of power. The same might be argued for arbitrating against the state in a state-based arbitration organization. This is the primary reason for the surge in the number of bilateral investment treaties in which foreign investors have the option of pursuing arbitration in one of many arbitration forums outside the host country.

Ease of enforcement-

Finally, the relative simplicity of enforcing an award versus enforcing a foreign court ruling is one of the reasons for international commercial arbitration's present popularity. The requested court has no international responsibility to enforce the judgement unless there is a treaty between the State where the judgement was issued and the State where enforcement is sought. While there are several bilateral treaties for the enforcement of judgements, the only important multilateral treaty is between European Union member states.

History Of International Commercial Arbitration:

With the ratification of the Protocol on Arbitration Clauses, the Convention for the Execution of Foreign Arbitral Awards, and the establishment of the ICC Court of International Arbitration in the 1920s, contemporary law regulating international commercial arbitration was born. Until

the ratification of the New York Convention in 1958[1], there was no significant additional growth. The years that followed were marked by fast advancement. In a short period, the arbitration procedure was harmonised. The 1976 UNCITRAL Arbitration Rules have been extensively adopted and have served as the paradigm for numerous institutional arbitration rules. Most arbitration legislation established after 1985 has been based on the 1985 Model Law.

The Washington Convention of 1965[2] established investment arbitration as a distinct type of arbitration. Although it was a theoretical advance at the time, it had little practical significance for the following few decades. However, it has gained prominence in recent years, owing to the increasing number of bilateral investment treaties that provide for investment dispute arbitration.

Dispute settlement on the edge of International Commercial Arbitration:

The boundary between international commercial arbitration and a variety of other dispute resolution methods can be blurry at times.

The most well-known process for settling commercial disputes in international trade is international commercial arbitration. Although it is a voluntary procedure that is dependent on the parties' consent, once such an agreement has been made, neither party may unilaterally withdraw from the arrangement. Arbitration serves a similar purpose to state court litigation except that it results in a final and binding judgement in the form of an award. In general, an arbitral judgement is easier to enforce in a foreign nation than a state court ruling. With a few exceptions, the States that have joined the New York Convention have committed to enforce international arbitral decisions. There is no equivalent international treaty that commits states to uphold the decisions of foreign state courts.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (last visited on 17 August 2021 at 6:22 pm).
[2] The Washington Convention of 1965 available at: https://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/landscape.pdf (last visited on 17 August 2021 at 6:24 pm).

Despite the fact that arbitration serves a similar purpose to litigation in state courts, under current arbitration rules, the parties are free to choose the method that will be followed in the arbitration, subject to the single norm outlined in Article 18 of the Model Law i.e.,

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

Investment arbitrations have increased significantly in recent years. The Washington Convention provides for a unique arbitration system at ICSID, which is used in many of these arbitrations. However, many of them are conducted through traditional international commercial arbitration tribunals.

Conclusion: What the Future Holds for International Commercial Arbitration in India?

To attract foreign investment, a fast-growing economy requires a dependable, stable dispute resolution mechanism. Because of the large number of cases waiting in Indian courts, commercial actors in India and abroad have developed a strong preference for resolving disputes through arbitration.

Despite being one of the original signatories of the New York Convention, Indian arbitration has not always followed international best practices. However, in the last five years, there has been a major shift in attitude. On all fronts, it is clear that change is occurring gradually. To give effect to the parties' desired decision, Indian courts have refrained from interfering with the arbitral procedure in situations where the parties opted to settle their issues peacefully through arbitration. Courts and lawmakers in India have brought Indian arbitration laws in line with worldwide best practises. Apart from the Arbitration and Conciliation (Amendment) Act 2015[3], the Arbitration and Conciliation (Amendment) Act 2018 and the Arbitration and Conciliation (Amendment) Act 2021[4] have brought about changes such as reducing the supervisory role of the courts to a significant extent and establishing the Arbitration Council of India for the purposes of giving institutional arbitration a boost. These efforts by the

[3] The Arbitration and Conciliation (Amendment) Act 2015 available at: https://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf (last visited: 17 August 2021 at 6:24 pm).

[4] The Arbitration and Conciliation (Amendment) Act 2021 available at: https://egazette.nic.in/WriteReadData/2021/225832.pdf (last visited at 17 August 2021 at 6:27 pm).

government demonstrate that India is taking all feasible steps to make the country more investor-friendly, which may lead to India being one of the most prominent arbitration hubs on par with other major centres.

The Indian arbitration jurisprudence is in for some exciting times, and our courts are prepared to tackle a number of cases involving the interpretation of the Act's numerous modifications.