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ARBITRATION IN THE ERA OF GLOBALIZATION

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Abstract: *With the increase of globalization and its need in recent times, companies have an increased tendency to globalize their market and ultimately have a more enormous outreach. With the changing dynamics in the cross-border trade laws and commercial laws, Arbitration has been a favourable alternative for commercial disputes. With the increase of commercial trades worldwide, Arbitration is a new law that can help India and other countries globalize. The purpose of the author is to find out what are the changes required for India in the domain of Arbitration and how to make Arbitration and e-arbitration a way to settle commercial dispute and also disputes relating to e-commerce. The result of this research was that Arbitration is one of the business-friendly ways for companies to resolve their disputes and how foreign laws and domestic laws for Arbitration if differentiated, would help India become a global hub for Arbitration.*

Keywords: Arbitration, globalization, companies.

“How true is it that humanity refuses compromise during prosperity, and reaches out for arbitration when weak”- JEAN SASSON

Introduction : In recent times, the global market and cross-border trades have increased like never before. Be it Entrepreneurs or Businessman everyone is now well known of the fact that if something can keep them up with the pace at which the present market is moving, it is innovation and with it, a good brand name, and in the fast-growing business world holding on to an in-progress legal suit or trying a fresh legal suit would cost the company monetary loss, it's brand image and the most precious thing, time. Be it patents, trademarks or simple business policy, the company or the startups require legal help to fulfil its need, but in a world where everything is growing at a hooping rate, business cannot hold on to the

endemic delay of the Indian Legal System. Here comes the World's next big thing in the field of law "Arbitration" which is a part of Alternative Dispute Resolution.

When India and all other countries are looking forward to globalization, Arbitration has become a default setting for commercial disputes in India and the world at large. The economic development in the era of globalization also gave rise to increase of business transaction. With the increase in globalization and the outreach of it to different countries, what makes some countries a less preferred place of doing business is the complicated laws and regulations of that particular country. Arbitration or International commercial Arbitration plays a significant role here by easing or instead fastening the process of entering into a foreign market which allows companies to focus more on the company's business.

Arbitration in the era of Globalization: It is not wrong to say that we are living with a social life which is largely determined by global process. Globalization is the word used to describe the growing interdependence of the world's economies, cultures, and populations, brought about by cross border trade in goods and services, technology and flow of investment, economic partnerships to facilitate these movements over many centuries.^[1] The arbitration word has been derived from the Latin word arbitration which means the power to get things done, according to the "wisdom".^[2] The economic development in the era of globalization also gave rise to the development of business transactions. Trading activity is one of the areas which support the economic activities in the community and has a prominent role to play in affecting the country's economy. The changes from the Arbitration Act, 1940 to the Arbitration and Conciliation Act, 1996 were done to keep up the pace with the changes of Arbitration laws in the international level. The Supreme Court in the case *Konkan Railway Corporation Vs. Mehul Construction Company*^[3] observed "to attract the confidence of the international mercantile community and the growing volume of India's trade and commercial relationships with the rest of the world after the new liberalisation policy of the government."

The rapid growth of the Indian economy and the opening up of it to trade and commerce with the outside world has brought up challenges which has inevitably resulted in an outreach to the international law and alternative dispute resolution resulting in Arbitration. The present era of internet has made people realize two things, firstly, Awareness of various international practices related to Indian Arbitration laws. Secondly, the understanding of deficiencies in the Indian

version of Arbitration laws. Although being aware of the fact of the deficiencies related to Indian Arbitration laws. The slow process of legislatures and policy makers have resulted in an ever-increasing interference of the judiciary to fill up the deficiencies, which led to debated interpretation to the Arbitration and Conciliation Act, 1996 which has been exhibited at the judgement of the Supreme Court in Bharat Aluminium Co. Vs. Kaiser Aluminium Technical Services.^[4] In a nutshell, the judgement by the supreme court was that the Arbitration and the conciliation Act does not apply to foreign seated international Arbitration. Section 2(7) of the Arbitration and Conciliation Act is to not distinguish the 'domestic arbitration' from 'international arbitration' but to distinguish 'domestic Arbitration' from 'foreign Arbitration'.

Arbitration process around the globe: If something in law is multijurisdictional and transnational, it is international commercial Arbitration. India has acquired great importance in the foreign market as an advancing economic power, and also secured its position as an important player in the international market of trade and commerce. Although the Indian arbitration law continues to cater the specific needs of the Indian citizens, it is at par with the best arbitration practice around the globe pertinently the arbitration laws in India, Arbitration and Conciliation Act, 1996 traces its genesis to the UNICTRAL Model law which has been accepted globally as the standard for arbitral proceedings. The three most relevant places as a hub of arbitration practices are United States, United Kingdom, Singapore.

Comparative Analysis of U.S.A and India: The Federal Arbitration Act govern Arbitration conducted at the federal and the state level in the United States. Unlike the Indian Arbitration laws, the Federal Arbitration Act have not been based and structured on the UNICTRAL Model law. It has been enacted in February 12, 1925. The aim of the act was for congress to allow alternative dispute resolution. The Federal Arbitration Act applies to all types of Arbitration Contracts, and also applies to state laws but several states adopt independent arbitration statutes pertaining to international commercial Arbitration.^[5] The Arbitration laws in India has been critiqued on intervening of the judiciary. The law commission of India has also advised on the need to balance out the scope of the judicial intervention, in order to make the judiciary a vital institution reinforcing Arbitration, rather than impeding the growth. The purposed amendments to the Arbitration and Conciliation Act, 1996, which have been elaborately discussed in the subsequent sections, inter alia aim towards ensuring this balance.^[6]

Comparative Analysis of United Kingdom and India: Unlike the United States's Federal Arbitration Act, the English Arbitration regime is similar to the Indian Arbitration Laws and also follows the UNICTRAL Model. The Indian Arbitration Act focuses and is more tilted towards Judicial review, The grounds in the case of the English Arbitration regime may be similar to the Federal Arbitration Act but their enforcement is more liberal.

There are a lot of similarities between the English Arbitration and the Indian Arbitration, although being similar in fields like respect to the judicial reviews Indian Arbitration should have a more liberal approach for ensuring high standards of neutrality of arbitrators and an adherence to ensure a faster process.

Comparative Analysis of Singapore and India: Singapore is one of the most sought-after seats for Arbitration in Asia. The geographical advantage of Singapore has been enhanced by other factors. Singapore is a modern, clean and extremely efficient country with an excellent infrastructure and world class communications. Added to this, it's government and courts have a reputation for integrity and competence which are second to none. Singapore offers the efficiency, integrity and skills of Switzerland and London in the heart of Asia. The courts have proven to be very knowledge-able on international Arbitration and are extremely supportive of it.^[7] Singapore's switch to the Model Law also traces a similar course, as was traversed by Indian law governing commercial Arbitration, both domestic and international. Despite having a common normative basis, the significant difference between Indian and Singaporean legal regimes governing Arbitration is the extensive flexibility available to parties to choose their preferred legal regime. Unlike India, parties to a non-international arbitration, with its seat in Singapore, are at liberty to 'opt in' to the procedure established under their International Arbitration Statute, instead of the local Arbitration Act. Exercising this option would place such an arbitration under a system where judicial intervention and oversight are limited.^[8]

Making India the Global Hub for Arbitration: As a developing country and a country that has a low labour cost in respect to other nations, India has recently been a hub for companies which tends to do business at the global level but the complicated laws of the country make it tough for them. To make India a global market for the world, it is important that we understand the needs of the outside world and incorporate the best practices for creating India into a global hub for

Arbitration. To increase the ongoing trade and cross border transactions we must try to restructure the Arbitral Institutions and laws to make the process business and people friendly. To restructure the Arbitration laws and Arbitral Institutions India can think of setting up Arbitral institutions in and around the country like the courts, India can think of setting up a dedicated bar, the country must keep a check on the disposals of the procedures, to conclude with the arbitration laws can be made separately for domestic Arbitration and international Arbitration respectively like the laws in Singapore.

Enforcement of Arbitral Awards: Arbitral awards is a determination on the merits by an arbitration tribunal, and is analogous to the judgement in the court of law.^[9] Although there has been a differentiation in the Domestic Awards and Foreign Awards there is no separate law for it. In the case of Domestic Arbitral awards, the Award holder have to wait for a tenure of three months after the receipt of the award prior to applying for enforcement and execution. During this period, the awards may be challenged as per section 34 of the Indian Arbitration and Conciliation Act. After the tenure of three months there can be no further challenges. In the case of Foreign Arbitral Awards, India has signed to the Convention on the recognition and enforcement of Foreign Arbitral awards, 1958, In New York convention and also in the Geneva conventions. If a party receives a binding award from the country which is signed to these conventions, the awards would be enforceable in India.

E-Arbitration and the Indian Legal System: With the emergence of increase in the cross-border trades and the emergence of the global markets throughout the world what has increased the most with it is the use of Internet. Information Technology, hereinafter referred to as IT has taken over a lot of things, be it booking a cab or managing your wedding everything is now possible through internet. With the changes in life of a human being, IT has brought a change in the traditional arbitral practices and procedures. To keep up with these developments a, lot of arbitral tribunals around the globe have adopted E-Arbitration Concept out of which ICC has taken a great lead and has issued guidelines for the use of IT in Arbitration. Electronic Mails, Voice over internet and a lot more similar technology has created a way for E- Arbitration to flourish in India and the world at a large. But to have E-Arbitration as a process in India like the

traditional arbitration process there needs to be a change in a few issues to match it up. The issues are Arbitral Agreements, Arbitral Proceedings and Arbitral Awards.

Arbitral Agreements: To submit or refer a dispute to E-Arbitration there are three conditions precedents that needs to be fulfilled. To begin with there must be an existing E-contract containing an E-Arbitration clause, furthermore the contract providing for E-Arbitration shall be in written form and to conclude a reference to E-Arbitration after the dispute has arisen. The agreement entered by the parties to refer the Arbitral tribunal. The agreement that would be joined by the parties to refer the arbitral tribunal must comply with section 10 of the Indian Contract Act, 1872. Section 7 of the Arbitration and Conciliation Act defines Arbitral Agreements, which means for an E-Arbitration clause to be valid, it must pass the test of Section 7 of the Arbitration and Conciliation Act. In the case of Shakti Bhog and Trimax the Hon'ble Supreme Court held that validity of arbitration agreements entered into by the exchange of E-Mails though no formal agreements in writing signed by the parties had come into existence. Section 4 of the Information Technology Act,2000 states as to where any law provides that information or any other matter shall be in writing or in typewritten or printed form, then notwithstanding anything contained in such laws, such requirements shall be deemed to have been satisfied if such information or matter is

- a. Rendered or made available in an electronic form and;
- b. Accessible so as to be usable for a subsequent reference^[10]

There are a set of arbitration rules which are one of the most commonly used guidelines which serve as a model clause:

1. UNICTRAL Arbitration and Conciliation Rules.
2. WIPO's Arbitration and Mediation Rules
3. LCIA's Model Clauses for Arbitration Rules.
4. ICC Rules of Arbitration and ICC Rules of Optional Conciliation
5. International Centre for Settlements of Investment disputes
6. American Arbitration Associations Model Clauses for Arbitration Rules

Arbitral proceedings: The Party's Autonomy is one factor that plays a vital role in determining the conduct of the Arbitral proceedings, and the right to change the rules of the procedures lies with the parties, whenever they want. Article IV of the European Convention and Article V(1)(d) of the New York Convention brings out somewhat similar where the former allows the parties to

freely organize the Arbitration by agreement, and the later says that the enforcement of the award may be refused if the procedure is not according to the parties. The UNICTRAL Model and the Arbitration and Conciliation Act allows that if parties agree to the use of online mode or electronic modes to conduct arbitral proceedings. Section 18 and 12 of the Arbitration and Conciliation Act is relevant to equal access to information. There must be a clarity between parties, for which the provisions of the Arbitration rules which are applicable must be inter alia, in a written form or a physical appearance of the parties before the tribunals.

In E-Arbitration parties may decide to conduct proceedings online and through electronic mode, hear expert opinions, examine and cross examine parties via technology which may also hinder the use of Technology into Arbitration and ultimately creating E-Arbitration as an alternative for Traditional Arbitration process.

Arbitral Awards: Section 31(1) of the Arbitration and Conciliation Act requires an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.^[11] To fulfil this clause and keep the process technology and online based, the written arbitral awards may be sent to the parties by scanned copies in PDF, JPEG or DOC form. Later, the original copy can be sent via post, courier or such equivalent services. The Arbitrator may affix a digital signature to make the copy authentic. Section 15 of the Information Technology Act in addition to section 11 of the Information Technology Act where the former secures digital signatures and the later allows Attribution, can be kept into view here. The process of E-Arbitration is fast, economically practical, time saving, but to increase the use of E-Arbitration and make it a reliable process, there must be a broader interpretation of statutes, in essence the Arbitration and Conciliation Act and the Information Technology Act.

E-COMMERCE and settling disputes through ARBITRATION: In the world of law, selling online is called with the term E-Commerce. Electronic Commerce has yet to have a term of formal. There are several terms which are known generally as E-Commerce, WEB Contract, and contracts of trade electronics.^[12] The e-commerce market today attracts millions of people worldwide. Commercial contracts are one of the domains of law that people are very casual about. Once a person agrees to the terms and conditions of a website it enters into a type of an e-contract with the company and allows the particular website to have an access to things that are written in the contract. In the case of e-commerce facilities, it may happen so that the failure of

commercial contracts can lead to disputes where the role of arbitration clause comes into play. The e-commerce sectors need online arbitration clauses because facing judicial proceedings in courts might be both costly and time taking.

Although Arbitration in e-commerce is still a small façade which would require time to reach its peak, the growing changes and the rate at which the country is globalizing needs technology based legal services as these offline legal services do not likely favour the e-commerce sector and the process of globalization at a large.

Conclusion: With the call for globalization and the introduction of several changes in law, there has been a clear preference for Arbitration in resolving the commercial disputes by companies, be it a multi-national company or a start-up. Everyone now believes in the outcome of Alternative dispute resolution techniques. India is a fast-growing economy whose prime aim is to make it a preferable market for global companies. To gain the interest of international market players, India requires to make its law more technology-based. To make India a global hub for Arbitration, with regular amendments as per the ongoing changes in the statutes of cross border trading, it also needs to bring in an altogether separate arbitral court and also to consider signing and ratifying international conventions and also extend the scope of recognition of arbitral awards to countries who are not reciprocating. While India is still in the process of developments in Arbitration laws of the country, the present sign of the change makes us optimistic.

Suggestions:

- Creating Arbitral Institutions in the country so that the process of Arbitration becomes easier.
- Constituting a dedicated bar for the Arbitral Institutes by which the arbitral process will be fast.
- Online Arbitration and the installation of technology into law
- Join in hands with countries who are not reciprocating and extend the reach of arbitral awards
- Different laws for domestic and foreign Arbitration.
- Signature with more conventions so that the arbitration process becomes smooth and ultimately help India to become the global hub for Arbitration.

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