A personal life, family life, political life

Business, Decision Making

A person’s life is surrounded by disputes andconflicts.

Dispute does affect life of a person weather it is personal life, family life, political life or economical life. The peaceful life of a personis disturbed by the presence of disputes. Since disputes arise in a person’slife which must be resolved as early as possible and with minimum cost. So thatthe concerned person may carry on his other engagements smoothly and freely forhis development.

Right of every person to resolve his disputesthrough courts and tribunals had been recognized and encouraged by him on civilizationsince long ago. As a common man understands asses to justice is asses to thecourt of law is a traditional concept. For a common man court is a place wherethe justice is provided to him. But to get justice from court has become atough job. There are so many factors which come in the way of a man to getjustice through courts, these may be poverty, illiteracy, social and politicalbackwardness, procedural formalities, ignorance etc. The costly and complexprocedure involved in litigation hinders a person’s to get his disputes resolvedthrough courts1. Due to such costly and complexprocedures of the courts the people throughout the world thought about analternate resolution of their disputes and arbitration is one among them. With globalization, Liberalization and Commercialization the International trade, Investment, transfer of technology, banking activates and the like grew up.

Keeping in viewsuch changing scenario India has updated its arbitration law to provide afriendly environment to both foreign and domestic entrepreneurs. Thearbitration law in India provides justice and fairness to all

the partiesconcerned. Increase in business all over the world increases contractingactivities. With such increase incontracting activities the commercial arbitration also increased. India inrecent years as part of economic reforms initiated in 1991 reform itsarbitration law to keep its arbitration law in line with International law. India has adopted UNCITRAL model law to bring judicial reforms in the countrywith a view to minimize the courts intervention in arbitration process. Thegovernment has a focus of simplifying the law for meeting out the requirementof a competent economy.

India has made investment protection agreements withvarious countries like Russian Federation, United Kingdom, Netherlands, Denmark, Malaysia, and Germany. Each such agreement contains provisions for thesettlement of Investment disputes between each contracting parties througharbitration, conciliation and negotiation. Arbitration means any arbitrationwhether or not administrated by permanent arbitral institutions2. but in simple terminology arbitration means a processby which a dispute or difference between two or more parties as to their mutualrights and liabilities is submitted to and determined judicially and withbinding effect by the application of the law by one or more person (thearbitral tribunal) instead of by a court of law3. Whenthe arbitration proceedings take place in India, the subject matter of thecontract, cause of action for the disputes and the merits of the disputes allgoverned by Indian law it is called a domestic arbitration. When the arbitration proceedings inIndia or outside India an either of the party to the dispute is a foreigner ornot a citizen of India or the subject matter is not falling in India and meritsof the dispute may be a the law of India or the

foreign law depending on thecontract of the parties in this regard, such arbitration is calledInternational arbitration.

When arbitration is conductedoutside India and the award made in such arbitration shall be called a foreignaward and such arbitration is called foreign arbitration and award made in suchforeign arbitration shall be sought to be enforced as foreign award. Adhoc Arbitration: In this type ofarbitration parties themselves arranged and agreed to the arbitration withoutrecourse to any institution. The arbitrators adopt the procedure and conductthe proceedings according to the agreement and with the concurrence of theparties. Such arbitration may be an international arbitration, domesticarbitration or foreign arbitration. In such type of arbitral proceedings theparties to the dispute shoulder the responsibility of setting up of arbitral tribunal; such arbitral tribunal will try to reach at an amicable solution between theparties.

If the arbitral tribunal could not reach at an amicable solution theparties may request a competent estate quote to intervene and settle thedispute. In this type of arbitration the party shall make provisions relatingto fees and expenses on their own with the arbitrators. Institutional arbitration: In thistype of arbitration an arbitration institution came into picture, sucharbitration institution provide rules for the conduct of arbitration proceeding. In this type of arbitration parties to a dispute move to arbitrationinstitution for settling their disputes, and such arbitration institutionsettle the disputes according to its own rules. Each arbitration institution hasits own rules and likewise the process of administration of

arbitration differsfrom one arbitration institution to another. In an institutional arbitration theinstitution may send a notification request to the other party asking it topresent its case on the point and on the constitution of arbitral tribunal. Thecost of arbitration shall be determined by the arbitration institution, becauseit has the power to do so.

The institution has also power to notify concernedof the awards made by arbitrators. This type of arbitration may be called asadministered arbitration. There may also be fullyadministered institutional arbitration, in this type of arbitration theinstitution not only receives request for arbitration to the other disputingparty but makes provisions for the constitution of arbitral tribunal, makesprovision for the advance on cost and provides for the place arbitration. Whenthe advance on cost is paid, the arbitral institutions forward the case to thearbitrators and make supervision up to the making of award by the arbitrators. Thissupervisory role of the arbitration institution helps the institution tocontrol the proceeding and see that if there is any chance of corruption orbiasedness on part of the arbitrators and to remove those biased and corruptarbitrators. It also directs the arbitrators to take up certain importantmatters relating to the case in hand.

It also take into consideration after makingthe awards to parties that fees of the arbitrators have been paid. It finallytake into consideration that the rules of the arbitration in respect ofprocedure and time are followed. At present the business laws ofpresent countries show a great divergence and come in conflict with each otheron matters relating to business.

Such conflicts and divergence come in the wayof smooth and swift flow of international business. To removes suchdifficulties the UNCITRAL has come forward made enacted certain model laws orconventions and also prepared guidelines on various subjects. The conventionare meant for reconciling the existing conflicts and diversities between civil law, common law and other several other legal systems prevailingin different parts of the world. India has also enacted its laws which attemptto reconcile and harmonize the legal framework relating to international tradeand business. As a result of globalization, liberalization andcommercialization the government of India took up the task of harmonizing itsarbitration laws with the rest of the countries of the world.

Presently the law relating toInternational commercial arbitration in India is Arbitration and ConciliationAct 1996 which radically based on UNCITRAL Model law. Before this Act the lawrelating to arbitration in India were Arbitration Act 1940, The Arbitration(Protocol and Convention) Act 1937 and Foreign Awards (Recognition andEnforcement) Act 1961. The Arbitration Act 1940 dealt withonly domestic arbitration while the other two Acts dealt with the enforcementof foreign awards. Now these three Acts have been repealed and replaced by theArbitration and Conciliation Act 1996, which is a consolidated andcomprehensive statute. This statute by and large adopts the UNCITRAL Model lawin its entirety. The Arbitration and ConciliationAct 1996 provides for minimum judicial intervention, party autonomy and fairtrial by an impartial tribunal.

There are many forms of arbitrations which arepracticed in India; these are Adhoc arbitration, institutional arbitration, specializedarbitration and statutory arbitration. In recent times there has been a gradualtrend in favour of institutional arbitration over adhoc arbitration because ofits several advantages. The term domestic arbitration and foreign arbitrationhas not been defined either in the statute or decided cases. HoweverArbitration and Conciliation Act 1996 defines the term International commercialarbitration. The Arbitration and ConciliationAct 1996 borrowed its provisions from UNCITRAL Model law and is an improvementover the Arbitration Act of 1940.

The Arbitration Act 1940 only dealt withdomestic arbitrations but the Arbitration and Conciliation Act 1996 deals bothdomestic and international commercial arbitrations and resolution ofinternational trade disputes. Although the Arbitration and Conciliation Actborrowed its provision from UNCITRAL Model law and is based on it but still itdeparts from Model law on various matters. For example sub section (1) ofsection 10 of the Act deals with number of arbitrators in an arbitral tribunaland provide that the number shall not be even number. The model law does notcontain any such limitation. The model law provides that where the parties failto determine the number of arbitrators, then in that case the number of arbitratorsshall be three.

The act provides that in such a case the arbitral tribunalshall consists of sole arbitrator. The Model law provides that if the partiesfail to reach on a contract relating to appointment of arbitrators then in thatsituation they may apply to the court of law or other authority specified forthe purpose for the

appointment of third arbitrator. The Chief Justice of aHigh Court is empowered under section 11 of the Arbitration and ConciliationAct 1996 to appoint an arbitrator. Chief Justice of India or any other persondesignated by him is empowered to appoint an arbitrator. Chief Justice of Indiaor Chief Justice of a High Court as the case may be is empowered undersub-section (10) of section 11 to make such scheme as he may deem necessary andappropriate for dealing with such appointment. Model law provides the procedurefor challenging an arbitrator, it provides that arbitral tribunal shall decideon the challenge and if a challenge is not successful, the challenging partymay apply to a court or other authority to decide on the challenge, during thependency of such application the arbitral tribunal may proceed and continue thearbitration proceedings and may make an award. But the Arbitration andConciliation Act 1996 under section 13 provides that the challenging partycannot move to the court at that stage. But after the award is made the partycan challenge the award on the ground that the arbitrator has wrongly rejectedthe challenge.

HISTORICALDEVELOPMENT OF ARBITRATION IN INDIAThe process of arbitration is notnew to India as the history has witnessed the adaptation of arbitration fromtime immemorial although with a different nomenclature. In ancient times thelaws were not in a codified form but there was an oral agreement and oralawards4. Thedisputes were settled between the parties by the tribunal, those tribunals werechosen by the parties themselves. Hindu civilization has recognized andencouraged this system of settlement of disputes. The tribunal was treated asthe final authority and their decisions were accepted as final and conclusive. The ancient texts and digests of

Hindu law also recognized some tribunals whichare in addition to the tribunals established by king; those tribunals were likePuga or Gana, Sreni and Kula.

We find the evidence of the presence of thesecourts in Smritis which talked about the authority of these agencies. Yagnavalka and Narada say that these courts were particularly the arbitrationtribunals. If we go through the history ofmedieval India we find that there was a concept of Panchayat system. Panchayatwas a reliable agency of justice delivery. The Panchayat played a great role insettling of dispute among people. Panchayat consisted of panches.

Those pancheshad a great and heroic role in settling of dispute between the parties. Pancheswere chosen by the elders by virtue of their qualities of being fair-mindedunbiased and knowledgeable. Any dispute irrespective of its nature could beresolved by the Panchayat. The panches were held in great respect. They wereconsidered to be the messenger of God as said by the Indian writer Munshi PremChand in “ Panch Parmeshwar”.

Sir Henery Maine, a jurist ofhistorical school of jurisprudence, said that Panchayat was always consideredas a representative body which was consisted of five persons. As we see that inIndia method of settling of disputes by the Panchayat is still found in certaincommunities. Arbitration was governed by social sanctions. But this system ofsettlement of dispute through Panchayat though useful was ineffective in orderto cater the needs arising out of advancement in social and economic spheres. ARBITRATION ACT 1940: In the year 1940 an important pieceof legislation was enacted by

the British Parliament, that enactment wasArbitration Act 1940. This Act consolidated and amended earlier enactmentsrelating to arbitration in India.

These earlier enactments were IndianArbitration Act 1899 and the second schedule to the code of civil procedure1908. This Act 1940 came into force on Ist July 1940 and was largely based onEnglish Arbitration Act of 1934. This Act provides Arbitration withoutintervention of a court. It applied to all arbitration including statutoryArbitration. This Act dealt only with domestic arbitration i. e which isconducted in India. Arbitration means any arbitrationwhether or not administrated by permanent arbitral institutions5.

but in simple terminology arbitration means a processby which a dispute or difference between two or more parties as to their mutualrights and liabilities is submitted to and determined judicially and withbinding effect by the application of the law by one or more person (thearbitral tribunal) instead of by a court of law6. When the arbitration proceedings take place in India, the subject matter of thecontract, cause of action for the disputes and the merits of the disputes allgoverned by Indian law it is called a domestic arbitration. When the arbitration proceedings inIndia or outside India an either of the party to the dispute is a foreigner ornot a citizen of India or the subject matter is not falling in India and meritsof the dispute may be a the law of India or the foreign law depending on thecontract of the parties in this regard, such arbitration is calledInternational arbitration. There exist a number ofInternational Arbitration Institutions such as International Court ofArbitration of the International Chamber of Commerce, International Center forSettlement of Investment Disputes (ICSID), China International and

Economic andTrade Arbitration Commission (CIETAC), International Center for DisputeResolution of the American Arbitration Association, Arbitration Institute ofthe Stockholm Chamber of Commerce, London Court of International Arbitration, Kuala Lumpur Regional Centre for Arbitration, etc which render their servicesin resolving the commercial disputes. STATEMENT OF PROBLEM: When the international trade and investmentgrew up the cross border commercial disputes has arisen. It becomes necessaryto settle such disputes for the smooth and swift flow of internationalbusiness. International commercial Arbitration came to be the preferred optionfor resolution of such commercial disputes and for preserving businessrelationships. With the growth of globalization, commercialization andliberalization international commercial disputes are rising.

This made India afocal point by the international community on India’s stand on internationalregime. Indian judiciary has beencriticized for its controversial decisions in the recent past, particularly incases where a foreign party is involved. It has also been criticized for itsinterference in international arbitrations and extra territorial application ofits domestic laws. The international community has kept close watch in the India’sdevelopment of arbitration laws. Thereis shift in the international commercial arbitral proceedings from India tooutside. The reason for the same seems to be that the individuals andassociations do not consider the legal regime in India compatible for quickdecision making.

Moreoverfor the enforcement of foreign awards, the award must be in tune with New Yorkand Geneva conventions or there must be existence of

reciprocating agreements, which is hampering the growth of international trade and hence affectinginternational commercial arbitration. On account of these reasons theresearcher has opted for the problem titled, “ International CommercialArbitration: A study of issues and perspective in India”. OBJECTIVES1. Tounderstand the concept of International Commercial Arbitration. 2. Toanalyse the International conventions governing International CommercialArbitration.

3. Toanalyse the efficacy of Arbitration and Conciliation Act 1996 in regulating theInternational Commercial Arbitration. 4. Toexamine the judicial response to International Commercial Arbitration. 5. Toidentify the grey areas concerning International Commercial Arbitration andtheir resolution. METHODOLOGY: The researcher shall use thedoctrinal research methodology.

The doctrinal research methodology is concernedwith legal propositions and doctrines. It involves analysis of case laws, arranging, ordering and systematizing legal reasoning or rational deduction. Ascertaining a legal rule for the purpose ofsolving problems is one of purposes of traditional legal research.

This hasbeen achieved by the original sources of law like the Act passed by theparliament and legislatures. The case laws decided by Supreme Court and HighCourts which are binding on the lower courts fall under the category of precedents. REVIEW OF LITERATUREThe researcher has gone through severalbooks, articles, regulation, legislature, Acts and generals etc by using lawlibrary of faculty of law, University of Jammu, Jammu. P.

Gilies and G. Moens book “ InternationalTrade Law and Business Law, Policy and Ethics” has been consulted for use ofarbitration law to resolve the dispute concerning international trade law andbusiness requirement of arbitration law to deal with disputes. The researcher has gone through, “ Law ofArbitration in India” by Durga Charan Banerjee from which the researcher hasstudied regarding the growth of arbitration law in India. The researcher has further consulted” Evidence and Procedure in Arbitration” by H.

Gill William to consult whatevidence and procedure is adopted in arbitration. The researcher has gone through “ The Lawof International Commercial Arbitration” by A. K Bansal form which the conceptof international commercial arbitration is consulted. Further the researcher has gone through “ ArbitrationAct” by Rameshwar Dayal from which the various aspects of Arbitration areconsulted. The researcher has further gone through” The Arbitration and Conciliation Act, 1996 and Alternate Dispute ResolutionSystem” by Dr. Tripathi from which arbitration as alternative disputeresolution system has been consulted. “ International Commercial Arbitration” byH. Martin and A.

Redfern has been consulted for implementation of internationalcommercial arbitration in India.” Law of Arbitration ADR and Contract D. PMittal has been consulted to see the use of arbitration in India.” Concise Law dictionary” has been used tosee the meaning of various legal terms.” International Economics and Trade Law” bySchimithoff and Simond has been consulted to see the impact of globalization toenact the new law for dispute resolution.”

Law of Arbitration" by S. D Singh isconsulted for law of arbitration and various dimensions." Arbitration Act" byJ.

P Singhal is consulted for looking into various aspects of arbitration law." Lawof Arbitration and Conciliation Act" by K. K Veenugopal, B. K Singh Bachawat, Mohinder Singh has been consulted to see the various dimensions of arbitrationlaw." Commentary on Arbitration andConciliation Act by P.

Chandershekhar Rao has been consulted regarding theworking of arbitration law in India. However there are research gaps which need to be addressed. TENTATIVE CHAPTERISATIONChapter 1: Introduction. Chapter2: Historical Development ofarbitration law in India. Chapter 3: Arbitration Commercial Arbitration: International and national Regime. Chapter 4: International Commercial Arbitration andJudicial Response. Chapter 5: Concluding Observations.

1 LawCommission of India, 222 Report on Need for Justice-dispensation throughAlternative Dispute Resolution etc., 2009 (April, 2009) 2 Arbitration and conciliation Act, 1996, S. 2(1)(a). 3Halsbury's Laws of England, IV Ed., Vol.

II, 1991 pp. 332-333. 4 Ministry of law and justice, Government of India." Proposedamendments to the arbitration and conciliation Act 1996- A consultation Paper"(2011). 5 Arbitration and conciliation Act, 1996, S. 2(1)(a).

6Halsbury's Laws of England, IV Ed., Vol. II, 1991 pp. 332-333.