INTRODUCTION

CHAPTER 1

Introduction

Justice is the concept of moral rightness which is based on the inalienable and inborn right of the humans to live with dignity and freedom, free from discrimination based on race, religion, caste, color and creed. System of delivering justice has been in existence from centuries, but it has changed with the change in the social, political and economic setup within the world.

The scientific and technological advancement that the world is witnessing today has transformed it into a global village where transcending national borders in a matter of hours is no longer a dream. Consequently, there is greater association and interaction among the people living across the globe. Modern means of communication has lead to exponential growth in trade in recent times. Individuals living in the different parts of the world have become more dependent on each other than they had been in the past. The effective, quick and advance means of communication have changed the very paradigms of trade. Technological innovation has always challenged the traditional means of conducting trade and commerce, while at the same time facilitating trade and commerce by providing faster and easier means of communication and access to a wide range of business opportunities, as well as goods and services.1 The tremendous development in the methods of communication in form of internet, mobiles, e-mails and telex etc, has lead to a change in the methods used to market the products. Hence, all these factors contributed to the growth of trade

---

in a manner which was not known earlier. In the layman’s language term ‘trade is the business of buying and selling goods and products in order to make profit. Buying and selling of goods is carried in number of ways, traditionally it was through sea, slowly and gradually through rails, air and more recently in a virtual manner, through internet. Internet, nowadays, has lead to the increase in trade by removing the trade barriers and cutting the costs thus facilitating the phenomenon of globalization. The rise of electronic sales of products and services by companies to consumers constitutes at present the most mediatised phenomenon.2 ‘Trade’ is a very wide term, and it encompasses all sorts of commodities; from a small quantity of a precious metal such as gold, supertanker full of oil, buying jets to the buying of food products.3 The buying and selling of goods and services across national borders is known as international trade. Today large industrial contracts, factoring, franchising, the cross-border insurance of other risks than marine and, more recently, financial investment services are an important part of international trade.4

International trade today has become so gigantic and so magnanimous, that it can rightly be regarded as the very backbone of our commercial world, and the main motive of those involved in it is to make maximum profit by selling their products in international market. There are number of factors which have compelled the people to move out of the national boundaries, some of which includes specialized markets, wide availability of the resources and advance means of communication etc. Industrialization, modern transportation methods, multinational corporations and outsourcing are the factors, the influence of which can be summed in no ordinary terms.5 This increase in trade has brought the world together and has transformed it into global village. Globalization is the phenomenon which today can be seen as something that is inevitable and irreversible. It is a phenomenon where different countries with different cultural, social and economic background try to benefit by interacting, by sharing, by guiding and learning from their own experiences in order to make

---

2 Id., at 14.
5 *Supra* note 3.
this world a better place to live with all efforts directed towards raising the standards of living of people in the different parts of the world. It is a process which is beneficial and is a key to the future economic development. Pascal Lamy commenting upon the globalization and its implications observed as follows; Globalization can be defined as the historical stage of accelerated expansion of the market capitalism, like the one experienced in the 19th century with the industrial revolution. It is fundamental transformation in societies because of the recent technological revolution which has lead to recombining of economic and social forces on a new territorial dimension.

Hence, it is imperative for the countries to participate in the international trade, reason being it indispensable for a country to provide best and essential commodities to its nationals. However, trade beyond the national boundaries, lead to mixture of cultures, unfamiliar philosophies, traditions and religions which has resulted in disharmony and conflicts. Increased interaction has also led to increase in disputes and they are an inevitable occurrence in any international commercial transaction today. Genuine differences can concern the meaning of the contract terms, the legal implications for a contract, and the respective rights and the obligations of the parties. Extraneous factors, human errors, whether through mismanagement or mistakes have also contributed to the non performance of the contractual transactions. Disputes mainly arise between the parties on account of failure to pay the money due under the contract. This may be because of the inability of the party to pay or it no longer wishes to pay. As a result, in the fast-paced, technology-driven and cross-border world of the twenty-first century with the involvement of huge amounts of money, some quick and effective method of resolving disputes is required.

CHAPTER 2

CONCEPTUAL DIMENSIONS

---

6 He is director general of the World Trade Organization (WTO). He is the fifth director general of World trade organization with his term starting from 2004 till September, 2013.
8 Ibid.
9 Ibid.
10 Ibid.
Different methods are employed by the parties to resolve the disputes that arise during the course of commercial transactions. Where the disputes have arisen and they cannot be resolved by negotiation, they will then have to be resolved with the help of a legal process. There are many ways of settling a commercial dispute. One is the traditional method of going to the Court, and putting the case before the judges, another is the alternative dispute resolution methods popularly known as ADRs. There are varied options that are available to the parties and which includes negotiation, mediation, conciliation, mini trials, the neutral listener agreement, summary jury trial and expert determination etc. The simplest is the negotiations between the disputant parties or their advisers. The problem with negotiation is that it is unlikely to succeed unless those involved are capable of certain degree of detachment and objectivity. ADR’s are the new way of resolving disputes which are preferred over the conventional techniques. The main reasons why parties to international commercial arbitration opt for the ADR’s to resolve their disputes is because they are relative quick and inexpensive.

Arbitration today has become important instrument for the settlement of the disputes. It has been seen during the course of study, as to how, the process evolved from its rudimentary stage to its present position. Concept of the arbitration includes fulfilling the requirements of a valid arbitration agreement, arbitrable matter, laws that reflects on the process of arbitration and the constitution of the arbitral tribunal on whom the success of the entire process is dependant. Arbitration is also one among the few, which nowadays is used for the resolution of disputes at international level. It is different from other alternative dispute resolution method because in arbitration the decision given by the arbitral tribunal is binding on the parties where as in other alternative dispute resolution methods the decision or the solution provided is not binding on the parties.

Being, one of the oldest methods used for settling international commercial disputes, arbitration is the consensual process of resolution of disputes with the help of a neutral adjudicator. International commercial

---

arbitration is a very common phenomenon today. But, there are as such no rules which have been prescribed for conducting the arbitration proceedings. Consequently, the process is carried in a very informal manner where parties sit in a room and put forward their contention.\(^\text{12}\)

The principle characteristic of the arbitration is that it is chosen by the parties. Party autonomy is the ultimate power determining the form, structure, system and other details of the arbitration.\(^\text{13}\) However, arbitration is not a national Court procedure; it is also not one of the other alternative dispute resolution methods as the tribunal after going through the matter will give its verdict at the end.

There are number of benefits associated with arbitration as a mode of settling disputes. Parties can without restraint regulate the entire process through their free will. They can choose the judges which will preside over the disputes. Further, the place of arbitration which is chosen by them will be a country which is neutral and will have no association with the parties to the dispute. Flexibility of the arbitration is the biggest advantage as the rules and procedure can be adjusted according to the wishes of the parties. Different matters require different considerations and different set of rules that will be applicable. Fourthly, arbitration as a process is very confidential and private in nature as opposed to the Court proceedings which are held in public.

There are different kinds and forms of arbitration. So, it is for the parties to determine which type of the arbitration is appropriate to their case. Basically the arbitration can be adhoc or institutional. Adhoc arbitration is also known as the tailor made arbitration and it will generally come into picture once the dispute has arisen. It is not incorporated into the main contract. However, the institutional arbitration takes pursuant to the arbitration clause which is incorporated into the main contract as mechanism for the resolving disputes which may arise between the parties in future. Important feature of the Ad hoc arbitration is the complete freedom which lies with the parties in conducting the entire process. In it, parties agree upon the number of the arbitrators, how they

\(^\text{12}\) Id., at 1; For details see infra Chapter 2
\(^\text{13}\) Supra note 7 at 4.
have to selected, what will be the place of the arbitration and which law will deal with the substantive issues in the dispute. Where as in the institutional arbitration, since the name of the institution has already been mentioned in the contract, arbitration will take place according to established rules of procedure which has been laid down by these institutions. There are various institutions which have the detailed rules of the procedure for conducting the arbitral proceedings for e.g. ICC\textsuperscript{14} (International Chambers of Commerce), LCIA\textsuperscript{15} (London Court of International Arbitration), AAA\textsuperscript{16} (American Arbitration, Association) etc.

Applicable laws also play very important role in the conduct of the arbitration and various options are available to parties. Choice of law clause is also very important as enforcement can be refused if the arbitrators have applied the law which was not chosen by the parties or which are applicable as a result of the conflict of rules. Arbitration, has over the years became a very popular mode of resolving disputes and has further, turned from a simple to more complex process with the intricate web of numbers of rules and institutions which came to have bearing on the arbitral process. It involves reference to number of national laws\textsuperscript{17} and international treaties. International arbitration is not regulated by one law or is carried according the law of the particular country. It is primarily governed by the different laws which the parties have chosen in the arbitration agreement. Since, the parties in a contract are from different countries and the contract has to be performed in a country other than the country to which the parties belong, the normal tendency of the parties is to choose neutral laws to resolve the issues which might arise between them. Even in a simple international commercial arbitration, there is the possibility of involvement of the at least four different national systems or of the rule of law. There are different components in arbitration which are regulated by different laws. First there is an arbitration agreement and law that will govern the agreement to arbitrate. Then there is law that governs the actual proceeding themselves. Next is the domestic law or the set of rules which the parties have

\textsuperscript{14} For details see infra Chapter 2.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Domestic Laws of the different countries of the world.
chosen and which the arbitral tribunal has to apply the substantive matters in the dispute. Finally there is law of the country in recognition and the enforcement of the award is sought.\textsuperscript{18}

Now, the entire arbitral proceedings will be conducted according the national law of the place of the arbitration. Parties can also choose the law of the place of arbitration to be the ‘governing law’ or the ‘applicable law’ or the ‘proper law’ of the contract which means it can also be used to decide the substantive issues or the main issues between the parties. Applicable law may also be different choice altogether which has nothing to do with the law of the place of arbitration. For example, if a party to a dispute has mentioned that arbitration will take place in London according to French law, then in this case law dealing with the arbitral proceeding will that of England and law that will deal with the substantive issues in dispute will be the French law. Moreover, the choice of the proper law is not restricted to choosing a national system of law of a particular country, parties have numbers of options to choose from, so, it can be international law, or a blend of national or international law, or even assemblage of rules of law known as international trade law and even the law of trade association of particular communities such as merchants known as the \textit{lex mercatoria} or some other law. Finally, because most international arbitrations take place in a country which is not that of the parties, the system of law which governs the recognition and the enforcement of the arbitral award will usually be different from that which governs the arbitral proceedings themselves. Therefore, the process arbitration is dependant on the agreement to arbitrate, the laws that will be applicable, decision given by the tribunal and lastly with giving effect to the award i.e. enforcement.

Entire arbitral process is dependent on the arbitration agreement which should be valid to put the arbitral machinery into operation. This is the requirement which is mentioned in the New York Convention\textsuperscript{19} and in UNCITRAL\textsuperscript{20} Model law.\textsuperscript{21} Parties to dispute can enter into the agreement to

\begin{itemize}
\item \textsuperscript{18} \textit{Supra} note 11 at 2.
\item \textsuperscript{19} For details see \textit{infra} chapter 2 and 3.
\item \textsuperscript{20} \textit{Ibid.}
\item \textsuperscript{21} \textit{Ibid.}
\end{itemize}
submit future disputes as well as the existing disputes to be settled through arbitration. So, for this some written record or evidence is required that parties want to settled issues through arbitration, rather than through the Courts which are institution established by the countries for providing relief.

CHAPTER 3

MEANING OF ARBITRAL AWARD AND FRAME WORK OF INTERNATIONAL CONVENTIONS ON RECOGNITION AND ENFORCEMENT

In this chapter the requirements of the valid award has been assessed. In the course of study it has been seen that award is the final decision by the parties on the matter which has been submitted for the resolution of the disputes. Award can be a final, preliminary or interim award. For conducting arbitration, the neutral judges are required, which are known as arbitrators, and there will generally be odd number of arbitrators, one, three or five for resolving the conflict between the parties. One of the important features of the arbitration is that parties are free to choose their own tribunal. However, the arbitrators so chosen have difficult task to perform because the parties as well as the laws that are applicable to the dispute are from different countries which have different social, economic and political set up. As a stated earlier, in the modern arbitral process, the decision is made by the arbitral tribunal composed of one or more arbitrators chosen by or on the behalf of the parties. The task of the tribunal is to consider the case put forward by each party and then to decide accordingly. An arbitral tribunal which is constituted to decide the dispute does not have the same powers as have been given to the Courts but there role is similar in the sense that ,they have to give final decision which will ultimately put rest to dispute of the parties. Disputes can be decided by the tribunal of three arbitrator’s or can be decided by the sole arbitrator, however, this will depend on the magnitude of the dispute and on the choice, which has been made by the parties. Once the award is made, the function of the tribunal will come to an end. Parties if not satisfied can challenge the award at place where it has been made. Further, the contents of the valid award like the requirement of the reasons, signature etc has been studied. After the award has been made the
winning party will take steps for the enforcement of the award. Since, the main rationale of the arbitration is the final resolution of disputes; as a result, the decision will follow the arbitral process, which is called as an award. Award is binding on the parties and it is required that they should give effect to the verdict of the tribunal, and this is in contrast with other alternative dispute resolution methods in which the decision given is not binding and it is up to the parties to decide about giving effect to the solution which has so been provided. The tribunal has to be careful while rendering the decision, should give reasons and most importantly should not go out of the ambit of the arbitration agreement. The procedure that may have been followed for arriving at the decision can be equated with the judicial procedure. An arbitral tribunal is bound to “act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent”.22

In the course of the arbitral proceedings the arbitrators are required to deal with number of preliminary and substantive issues such as whether they have the jurisdiction, laws that will applicable and limitation of the action etc. Depending on the issues before it arbitral tribunal can render partial award or interim award or the final award. The award may concern legal or factual differences between the parties, may involve the interpretation of contract terms or determining the respective rights and the obligations of the parties under the contract.23

But no definition of the term award can be laid down. In lay man’s language it means the final determination of the rights and the obligations of the parties. There are certain consequences that will entail once the award is given. Tribunal’s authority will come to an end once the award has been made and it will also act as res judicata between the parties in regard to same claim.

Award means that parties are required to give effect to it, but in case the losing party is running away from its obligation then the need for the enforcement proceedings is required.

22 Supra note 11 at 10.
23 Supra note 7 at 628.
The recognition and enforcement of the award is of paramount importance for the success of arbitration in international arena.\textsuperscript{24} One of the main aims of the arbitration is provide relief to the parties in shortest span of time possible, and if the parties are not giving effect to the awards then entire purpose of litigating out of the Court is frustrated. It is possible and easier to give effect to the awards nationally and at the international level with the help on number of international instruments on the international commercial arbitration. For the enforcement of the awards the regulatory framework of the convention like the Geneva Protocol, 1923,\textsuperscript{25} Geneva Convention 1927,\textsuperscript{26} and most importantly the New York Convention has been studied. It has harmonized the laws relating to arbitration and the enforcement off the awards. More than 148 \textsuperscript{27} countries are signatory to the Convention. It provides only limited grounds on basis of which the award can be refused enforcement According to the report, which was prepared by Van den Berg, more than 95\% of awards have been voluntarily performed. This has become possible with the help of New York Convention which has harmonized the rules relating to recognition and enforcement.

CHAPTER 4

GROUNDS FOR THE REFUSAL OF RECOGNITION AND ENFORCEMENT

As stated above, the parties generally carry out the decision which is given by the tribunal on their own. Most arbitration rules provide that the parties by submitting their disputes to arbitration undertake to carry out the award without delay.\textsuperscript{28} It is difficult to procure actual data on the enforcement because the process is private in nature and tribunal is not bothered after making the awards whether the parties have carried it out or not.

In arbitration, where the party does not give effect to the award then the winning party has to institute proceeding in the countries where the losing party

\textsuperscript{24} Id., at 688.
\textsuperscript{25} For details see infra chapter 2,3 and chapter 4.
\textsuperscript{26} Ibid.
\textsuperscript{27} As on February, 2013.
\textsuperscript{28} UNCITRAL Rules Article 32(2); AAA ICDR Article 27(1); ICC Article 28(6) : LCIA Article 26(9); Stockholm Institute Article 36; WIPO Article 64.
has assets for the enforcement. Before instituting the proceedings, sometimes, the commercial or diplomatic pressures are used to give effect to the award. In case the party still is persistent in its stance of not giving effect to the award then enforcement proceedings become necessary.

Recognition and the enforcement are concerned with giving effect to the award. Both are technical terms. Recognition is generally granted by the Courts of the place of arbitration declaring that disputes has been resolved and matter is not subject to appeal. Main aim is to stop the party from initiating proceeding in the matter that has been decided. Enforcement means that the Courts of the countries where losing party has assets will ask the party to carry out the award. Purpose of enforcement is to compel loosing party to perform an award in case he fails to carry it out. Enforcement of the award is difficult and the main reason for the same is the involvement of numbers of laws that become relevant and further the problem is that they do not coincide with each other. But the problem has been greatly resolved with the help of the New York Convention\textsuperscript{29}, which is one of the most widely accepted international conventions and is a major improvement over its earlier predecessors.

Consequently, the enforcement which is one the difficult aspect of International commercial arbitration, now days, however, has become relatively easy. Onus is on the party who is resisting the enforcement to show that one of the grounds exists on basis of which the Court should refuse the enforcement. There are few grounds on which enforcement may be refused like the agreement to arbitrate was not valid agreement, parties did not had the necessary capacity, notice of the appointment of the arbitrators was not given to the parties, arbitral tribunal has exceeded its authority, the awards has been set aside in the place where it was made. However, apart from the grounds mentioned in the Convention, two grounds, one of the public policy and the other of arbitrability of the subject matter of the dispute can be raised by the Courts of the enforcing states. Different Courts have given different interpretation to the various grounds that are mentioned and which are analyzed to suggest the changes that

\textsuperscript{29} Supra note 19.
can be made. Some of them have given narrow interpretation some of them wide interpretation which has lead to the refusal of the enforcement of the award.

But, still because of involvement of different systems of national laws and law of one country not in uniformity with other, there is substantial degree of problem in recognition and enforcement of awards. Courts in different countries have interpreted the same provisions of the convention in different manner. Public policy ground which is to be raised by the Courts of the enforcing countries has resulted in refusal of substantial number of awards as the countries have given wide interpretation to the term and have equated it with their national standards.

CHAPTER 5

RECOGNITION AND ENFORCEMENT: LEGISLATIVE AND JUDICIAL RESPONSE IN INDIA

In India, as well, the system of resolving disputes through arbitration is prevalent from ancient times. Disputes were referred to the elderly people within the society, who after going through the entire dispute would give decision and people would generally respect the decision which was so given. The system of resolution of disputes through arbitration continued to be present during the time when the British were ruling in India. In pre independence era, number of Acts and regulations were passed by the British which had arbitration as a mode of the settlement of those disputes. Thus, during that time numbers of Acts\textsuperscript{30} were passed to formulate a system of arbitration, which was in line with the British jurisprudence. Indian social, political and economic structure has changed over the years. The first consolidated law on the subject was, the Arbitration Act 1940,\textsuperscript{31} which was repealed, and on January 25, 1996 replaced with the current Arbitration and Conciliation Act 1996.\textsuperscript{32}

The 1996 Act was enacted in order to make the Indian law of arbitration more in lines with contemporary requirements of the Model Law\textsuperscript{33} which was

\textsuperscript{30} For details see \textit{infra} chapter 2 and 5
\textsuperscript{31} \textit{Ibid.}
\textsuperscript{32} \textit{Ibid.}
\textsuperscript{33} \textit{Supra} note 21.
prepared by the United Nations Commission on International Trade Law (UNCITRAL). The earlier Arbitration Act, 1940 was not considered to be as effective. The main reason was that, the former arbitration law dealt only with the disputes of domestic nature, whereas the 1996 Act, seeks to provide an effective mode of settlement for domestic as well as international commercial contracts. In addition, the Act of 1996 has also incorporated Conciliation as a method of resolving conflicts, since none of the earlier laws provided conciliation as a mode of settlement between the parties, so, it is a novel change. The Arbitration Act, 1996 is divided into four parts. Part I deals with the domestic arbitration and Part II deals with the international commercial arbitration, Part III with Conciliation and Part IV with the supplementary provisions. However in the course of research it has been observed that judiciary has interpreted the various provision of the Act and the role of the judiciary has been studied to suggest in the end that approach taken is parochial taking into account the changes that have taken in the international field and having an Act which has clearly distinguished between the domestic and international Arbitration.

CHAPTER 6

CONCLUSION AND SUGGESTIONS

Based upon the research that has been carried out the conclusion has been provided to make the process of resolution of disputes with the help arbitration easy and effective. Legal regime in regard to the recognition and enforcement has been analyzed to find out lacunas and the deficiencies which exist and which are to be tackled at the national and international levels to make the process of resolution with the help of arbitration more effective. Finally suggestions are made based upon the lacunas that are found to exist during the course of the study.

Arbitration, in today’s time is being used in the widespread manner to resolve the differences and conflicts. It has become very organized and has emerged in a very sturdy manner to replace the proceedings in the national

34 Supra note 20.
Courts, but, still there are certain grey areas which need change. As a result, in this research the main thrust first of all is on analyzing the deficiencies and lacunas in the arbitration agreements, procedure that is followed in arbitration and way arbitral awards are made. Further international legal framework for recognition and enforcement along with its lacunas and options available to loosing party to resist enforcement or more precisely grounds for refusal of recognition and enforcement are analyzed and to suggest the changes that can be affected.

Objective of study

The object of the research is to explore the extent to which international law working through the framework of International Conventions, national laws, institutional rules and Model laws are equipped to deal with Recognition and Enforcement. Keeping in view the intricacies of the arbitral process and the involvement of different municipal systems of law, study has emphasize on the need for having Arbitration as an alternate method for resolving disputes, challenges that arise while conducting arbitral proceedings and finally steps taken by the party who is successful in arbitration to get the award rendered by the arbitral tribunal enforced. The main object of the study is:

- To examine how the concept of Arbitration emerged, need for having such a method of resolving disputes despite having well defined system in form of Courts.

- To evaluate the formal requirements as to validity and contents of arbitration agreement and arbitral awards. To look into deficiencies and lacunas in arbitration agreements and awards, that can result in refusal of recognition and enforcement.

- To analyze the grounds on which recognition and enforcement may be refused.

- To examine the institutional and functional deficiencies under international conventions and national legal systems relating to recognition and enforcement.
• To study the role played by various Courts at the place of arbitration, during arbitral process, after the arbitral process and finally at the stage of recognition and enforcement.
• To study Indian legal framework dealing with recognition and enforcement.
• To suggest the changes that can be affected.

Research Hypotheses

To achieve the above said objectives, the research hypotheses rest on the following assumptions:

• Resolving disputes through private mechanism such as Arbitration is an effective mode to expedite the process of justice in the globalised world.
• The present legal regime for the recognition and the enforcement of the awards in international commercial arbitration is parochial in outlook.

Research methodology

The present research work is primarily doctrinaire in nature. Considering the close interaction, the research issues has with various national systems of the world, the research methodology which is adopted for the present work is the study of both, primary and the secondary data. The primary data is in the form of international conventions, documents such as the Law Commission Reports, municipal legislations etc. The secondary data has been collected from the sources such as books, journals, websites and the judicial pronouncement made by the Courts in different countries.

Universe of study

In present research the intricacies that are involved in arbitral process beginning from the formation of arbitration agreement to making of an award, grounds for challenging the award and ultimately the reasons for refusal of recognition and enforcement are analyzed. For this, present research has
concentrated on domestic laws of various countries including United Kingdom, United States and India. International Conventions, Models law, rules of various arbitral institutions dealing with recognition and enforcement have also been analyzed to find out lacunas and defects.

Therefore, books, articles and cases in the course of research have together helped in understanding the concept of arbitration and particularly the concept of enforcement of the awards.