TOPIC-DEVELOPMENT OF ARBITRATION IN INDIA
INTRODUCTION

In any country, disputes are common between two parties involved in business, contracts etc. So, whenever there is a dispute raised between two parties, they will look into only solution that is Court. When the people approach the Court, there will be delay in the decision, even though right to speedy trail is a fundamental right. So, for avoiding this kind of delay and to get a remedy soon and effectively with proper justice in the decision, the ‘Alternative dispute resolution’ [ADR] was mooted.

The Alternative dispute resolution is of four kinds like Arbitration, mediation, conciliation and negotiation. In that Arbitration is a common dispute resolution which has been used as most common process. The Arbitration means “settling out a dispute outside the courts with speedy and effective solution by the arbitrator.”
The purpose behind for going to a arbitration is to get a speedy remedy for the arisen conflict or misunderstanding between the parties and also reduce the burden of the Court where already plenty of cases are pending.

In India there are lot many cases pending before the court which are getting delay by some kind of reasons like vacancy of court, strikes or delay by the lawyers etc., So it is known to us that “Justice delayed is Justice denied”. The Arbitration process will take less time and cost as compared to litigation in court.

This kind of Arbitration system is not new. It is prevalent from the Vedic period which can be traced from the Upanishad. The award of the Arbitrator is regarded as a award of court or decree of court. The citizens are afraid of litigation in court because of delay in the decision, where an average civil suit can take a years to get resolved.
During this period the disputes used to resolve by ‘PANCHAYATS’ where old and efficient person will be the member of the panchayat as judges and these members were called as ‘PANCHAS’.

The sage Yajnavalkya in the Brhadranayaka Upanishad refers to a various types of Arbitral bodies like:

- The PUGA – This consist of a persons belonging to a different tribes and sects but they were residing in the same locality.
- The SRENI – This is kind of a assembly of tradesmen and artisans belonging to different tribes but connected in some way with each other.
- The KULA – This is a group of persons bound by family ties.

The decisions of these three bodies are final and it used to be binding on the parties of the dispute. Any aggrieved party can, however, go for appeal against the decision of the kula to the Sreni; from the decision of the sreni to the Puga and finally from the decision of Puga to the Pradvivaca. Though these bodies were non-governmental and the proceedings before them were of informal nature, their decisions were reviewable by the municipal courts.
The Muslim law came to India through Islam where the origin of Islam was in Arab. All the laws of Muslims were in Quran.

Imam Abu Hanifa and his disciples Abu Yusuf and Imam Mohammad in their commentary, which came to be known as the “Hidayah”, systematically compiled the Muslim law.

The language of book [Quran] was in Arabic.

All the Muslims were governed by Islamic laws, in that the main act is Sharaith Act which has been codified for all kinds of practices of Muslims and their disputes will be decided or resolved through this act only not by any other laws but this act was not applicable to non-Muslims.

Hidayah – According to Islamic belief it was a guidance which has been provided by Allah to Humans primarily in the form of Quran.

This Hidayah contains the provisions relating to arbitration for the persons having disputes regarding any matter like contract, marriage or etc., where used to resolve by the Muslim person only as a Arbitrator and he was called as “HAKAM”, the arbitration was called as “TAHKEEM”.
The East India Company did not repeal or do away with the law relating to arbitration as prevalent in the country at the time when it came into power. But between the years 1772 and 1827 the government gave legislative form to the law of arbitration by promoting regulation in three towns viz CALCUTTA, BOMBAY, MADRAS as regulations like:

- Bengal Regulations LVIII of 1781
- Madras, the Regulation of 1816
- Bombay, the Regulation VII of 1827

At starting point these regulations had a lack of clarity and uniformity later an substantial change was made to them.

For the Bengal regulations some changes were made in 1787, 1793 and 1795

During the British period these were the laws regulating the proceedings of arbitration

These remained in force till the Civil Procedure Code 1859 (Act No 7 of 1859), was extended to the Presidency towns as well, in 1862.
After the establishment of the Legislative Council in India in the year 1834, it passed the Code of Civil Procedure Act 1859 (Act No 8 of 1859) with the object of codifying the procedure of Civil Courts except those established by the Royal Charters, namely the High Courts in the Presidency towns of Calcutta, Bombay and Madras. Sections 312 to 325 dealt with arbitration in suits while sections 326 and 327 provided for arbitration without court intervention. The Regulations in the Presidency towns continued to remain in force till the Civil Procedure Code 1859 was extended to the presidency towns in the year 1862.
The Code of Civil Procedure Acts 1877 and 1882

- The Act of 1859 was repealed by the Code of Civil Procedure Act 1877, which was again revised in the year 1882 by the Code of Civil Procedure Act 1882 (Act No 14 1882). The provisions relating to arbitration were mutatis mutandis reproduced in sections 506 to 526 of the new Act.
The Legislative Council enacted the Indian Arbitration Act in the year 1899. This Act was substantially based on the British Arbitration Act of 1889. It was the first substantive legislation on the law of arbitration in India, nevertheless, its application was only confined to the Presidency towns viz, Calcutta, Bombay and Madras. It expanded the area of arbitration by defining the expression ‘submission’ to mean ‘a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not.’

Prior to that, the expression ‘submission’ was confined only to ‘subsisting disputes.’ Thus, before the legislation, a contract to refer disputed matters to arbitration, was governed by three statutes, namely (a) the India Contract Act; (b) the Code of Civil Procedure; and (c) the Specific Relief Act. In view of the provisions of the contract Act and the Specific Relief Act, no contract to refer existing or future disputes to arbitration, could be specifically enforced. However, a party who refused to perform, was debarred from bringing a suit on the same subject. In this situation, by and large the courts had to draw sustenance from the common law principles of English law. Consequently, the law of arbitration was far from satisfactory.
The Schedules to the Code of Civil Procedure 1908

- In the second of new code of civil procedure 1908 were included the provisions of arbitration. The laws relating to the arbitration were contained in the First schedule of this code which extended to the parts of India.

- And the second schedule used to deal with arbitration outside the operation and scope of the act 1899. By and large this schedule relating to the arbitration in suits while briefly providing the arbitration without intervention of a court.
The main purpose of the Act was to give effect to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. This Act applied only to such matters as were considered ‘commercial’ under the law in force in India.  

The operation of this Act was based on reciprocal arrangements and it mainly concerned itself with the procedure for filing ‘foreign awards’, their enforcement and the conditions of such enforcement. The Rules framed by the High Courts provided details in respect of the proceedings under the Act.  

The provisions of this Act now have been amended and consolidated in the Arbitration and Conciliation Act of 1996 in part II, Chapter 2.
The Arbitration Act of 1940

The judicial reprimand as well as clamour of the commercial community led to the enactment of a consolidating and amending legislation viz. The Arbitration Act of 1940. This Act purported to be a comprehensive and self-contained Code. Its provisions are summed up as under:

(i) It made provision for – (a) arbitration without court-intervention;

(b) arbitration in suits i.e. arbitration with court-intervention in pending suits; and
(c) arbitration with court-intervention, in cases where no suit was pending before the court. It then proceeded to make further provisions, common to all the three types of arbitration.

(ii) It defined the ‘written agreement’ to mean a ‘written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.’ In other words, in the absence of a ‘difference’ or an ‘agreement’ to refer the same to arbitration, there could be no ‘arbitration’ as postulated by the Act.

(iii) It also introduced deeming provisions to include the ‘provisions set out in the First Schedule’, in so far they were applied to the reference.
This Arbitration Act of 1940 made provision for protecting the ‘agreement’ from being vitiated by the mere presence of some lacuna in it.

(v) It empowered the court to remove an arbitrator and the umpire and to substitute for them, with new ones ensuring that the arbitration did not fail by reason of want of diligence or misconduct on their part.

(vi) It conferred certain powers on the arbitrators and the umpire to facilitate the effective discharge of their functions.

(vii) It empowered the court to deal judicially with the award after it had been filed before it, enabling it to pass its judgement, including the discretion to modify, remit or set aside the award. These provisions primarily applied to non-court-intervention cases.

(viii) In cases of arbitration with court-intervention, where there was no pending suit, detailed provisions were made relating to the form and manner of making an application to the court for filing the ‘agreement’ and also as to an order of reference to the arbitrator appointed by the parties. The Act provided that the arbitration shall proceed in accordance with its other provisions, insofar as they could be made applicable.
(ix) In cases of arbitration with court-intervention, where a suit was actually pending in the court, all the interested parties might agree to refer any matter in dispute to arbitration. The Act made detailed provisions as to the appointment of arbitrator and the order of reference. The other provisions of the Act, insofar as they could be made applicable to the arbitration, were made applicable to such arbitration as well.

(x) The Act made general provisions to the effect that the awards should be approved by the court by a judgement as to the existence, validity and effect of the awards or of ‘arbitration agreement’ between the parties to the ‘agreement’ or persons claiming under them. The intention of the legislature, in enacting these provisions, was ‘to make only one court as the venue for all matters connected with the “arbitration-agreement” or “award” and also to make “applications” (not “suits”) as the basis for approaching that court. The intention was to make explicit that no suit of any kind whatsoever would lie in this behalf.
After the end of the Second World War, particularly after the Independence in 1947, the trade and industry received a great fillip and the commercial community became more and more inclined towards arbitration for settlement of their disputes, as against court-litigation, which involved long delays and heavy expenses.

With the increase in the importance of arbitration, there was a weakness in the judiciary with many failure and lacunae in the Arbitration Act 1940. In this act there was inadequate about the duties and powers of arbitrators and also about procedure for conducting the proceedings.

The act was also with weakness was silent about individual private contract. The rules providing awards were different from one high court to another high court. There were also lack of provisions regarding the arbitrator for resigning at any time in the course of proceedings, where it made heavy losses to the parties.

There were no provisions requiring the arbitrator to state reasons for sustaining the award. There was no remedy against a non-speaking award albeit such an award could lead to suspicion and embarrassment.
The Law Commission of India, in its report dated on 9th November 1978, suggested extensive amendments in the Arbitration Act of 1940, taking into account of commercial realities and also in order to settle the conflicting decisions on various points which were arising during the course of business.
The Supreme Court on the Act of 1940

- The Supreme Court of India in the case of Guru Nanak Foundation v Rattan Singh and Sons,(AIR 1981 SC 2075- 76. ) held that the proceedings under the Arbitration Act of 1940 ‘have become highly technical, accompanied by an unending prolixity at every stage, providing a legal trap to the unwary.’
According to Lord Mustill the New York Convention was ‘the most effective instance of International legislation in the entire history of commercial law’ in which India was a signatory to it. The main purpose of the aforesaid Act was to give effect to the convention.

In the case of Renusagar Power Co Ltd v General Electric,(AIR 1985 SC 1156. )The Supreme Court of India delivered a landmark judgement and held that the main purpose of the legislation was to facilitate and promote international trade by providing for speedy settlement of disputes arising in trade through arbitration.
The United Nations Commission on International Trade Law (UNCITRAL) Model Law

The General Assembly of the United Nations in December 1966 established the United Nations Commission on International Trade Law for the purpose to promote the International trade. This body has been described as ‘the core legal body within the United Nations system in the field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonisation of trade law
Arbitration and Conciliation Act, 1996

The law relating to arbitration is contained in the Arbitration and Conciliation Act, 1996. It came into force on the 25th day of January, 1996. It extends to the whole of India except the State of Jammu and Kashmir. The Act is of consolidating and amending nature and is not exhaustive. But it goes much beyond the scope of its predecessor the 1940 Act. It provides for domestic Arbitration, international commercial arbitration and also enforcement of foreign arbitral awards. It also contains the new feature on conciliation. It proceeds on the basis of the UN Model Law so as to make our law accord with the law adopted by the United Nations Commission on International Trade Law (UNCITRAL).
Purpose of the Act

- The purpose of the Arbitration and Conciliation Act, 1996 was as follows;
  - An Act to consolidate and amend the law relating to domestic arbitration,
  - international commercial arbitration and
  - enforcement of foreign arbitral awards as also
  - to define the law relating to conciliation
  - and for matters connected therewith
  - or incidental thereto.
Constitutional validity of the Act

- According to Article 51 (d), the state has to endeavour to encourage settlement of international disputes by arbitration.
- The constitutional validity of this Act has been upheld by the Supreme Court in Babar Ali v Union of India. In view of the judicial review being available for challenging the award in accordance with the procedure laid down in the Act, the Court said that there is no question of the Act being unconstitutional.
Shortcoming of the Act, 1996

- **Section 9**: This section may be misused by the party because may not take the initiative to have the arbitral tribunal constituted, after obtaining an interim measures and may delay the process.

- **Section 14**: This section state that the mandate of an arbitrator shall terminate but after termination who (party) will pay the arbitrator for the services he rendered in the proceeding and what will be the quantum of fees.
This section is related with appointment of the substitute arbitrator after termination of the mandate under section 14. But there is nothing written in this section that could say that within what time the substitute arbitrator shall be appointed.

There is no provision that could enable the arbitrator to give the award quickly. The Arbitration Act was enacted with the sole purpose to provide speedy settlement of dispute. Nowadays the proceeding takes four to six years average for settling the dispute. Thus, the object of the Act is not achieved till now.

The aggrieved party has to start again from the district court for challenging the award.

There is no provision in the Act as to enable the court to give the judgement quickly where the applications are filed for setting aside the arbitral award.
Arbitration has increasingly become a preferred option to settle commercial disputes globally as well as in India. It was high time that urgent steps be taken to facilitate quick enforcement of contracts, easy recovery of monetary claims, reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage foreign investment by projecting India as an investor friendly country having a sound legal framework and ease doing business in India.

Considering these factors and the need of time, the current Government promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend certain provisions of the Arbitration and Conciliation Act 1996 which received assent from the President on 23 October, 2015.
Few Amendments

- Amendment to Section 7: An Arbitration agreement contained through electronic communication shall also be treated as an arbitration agreement in writing.
- Amendment to Section 9: Where the Court passes an order for any interim measure under subsection (1) of Section 9 before the commencement of arbitral proceedings, the arbitral proceedings shall be commenced within a period of ninety days from the date of such order.
- Amendment to Section 11: Appointment of arbitrator shall now be made by the Supreme Court or the High Court, as the case may be, instead of the Chief Justice of India or the Chief Justice of the High Court.
Amendment to Section 14: On termination of mandate of an arbitrator, he is to be substituted by another arbitrator.

Amendment to Section 23: The respondent, in support of his case, may also submit a counterclaim or a setoff, if such counterclaim or setoff falls within the scope of the arbitration agreement.

Amendment to Section 24: The Arbitral tribunal shall hold oral hearing for the presentation of evidence or oral arguments on the day to day basis and shall not grant any adjournment without any sufficient cause.
Arbitration plays very important role nowadays because of its speedy decision as of compared to regular courts and it consumes less time and less money. So still many people don’t know about this kind of dispute resolution, there should be awareness should be made.

Now there we also heard about online dispute resolution where through modern technology by internet the dispute will be decided. When we add our facts, issues and prayer by both the parties, the decision will be given correctly by the computer. If this comes then still more easy to get remedy and less money & time consumes for resolving the dispute.