

## ARBITRATION IS NOT, AND SHOULD NOT BECOME, A LAW UNTO ITSELF

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### **Introduction**

Alternative Dispute Resolution (ADR) is an alternative to the first system of dispute resolution that is courts. ADR is wide term in which comprises of various types of alternatives like arbitration, mediation, conciliation, good offices, negotiation etc. ADR is a mode of deciding disputes in non-confrontational way. Conflicts have been reason of many problems across the globe. It is believed in corporate, 'Time is Money'. Alternate Dispute resolution is a way to save time from the litigation process of courts. It is way of minting money by saving time. Conflicts are a problem that exists in society, between people, between corporate, between corporations, between states etc. In ancient religion text it is believed that the solution to every problem can be peaceful. The aim is always to maintain or attain peace.

In recent past, the acceptance for various methods or modes as ADRs has been accepted practically as well theoretically. The best advantage of the ADRs is that they limit the conflict and try to reach an amicable solution for the problems that exists in the society. The parties stop allegations on each other and try to find a solution that acceptable to both the contesting parties. There are few ADRs which are binding in nature where as others can be non-binding in nature. In other words, in few ADRs the parties have an option to leave the ADR at anytime during the proceedings. The example is Mediation. The example for the binding ADR is Arbitration.

Generally all the ADRs are based on the working of the neutral party as a mediator or an arbitrator or as a facilitator. This is important aspect as the neutral can really reduce the communication gap between the conflicting parties and convince them to accept the solution either suggested by them or agreed by the parties. The objective that is achieved by the ADR is of the Win-Win situation for both the parties. None of the parties loose with the help of application of ADR. The win-win situation is possible only if the ADR is able to achieve that the parties are not

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left alone at the dead end and where there is communication established amongst them.

Arbitration is a global process which is related to the business across the globe. The stake on the arbitration is pretty high, if we add the values or money involved in the cases. Arbitration is one of the constituents of ADR. Arbitration is conducted by arbitrator. This arbitrator is appointed by the parties themselves and then he decides on the dispute. The judgment is known as arbitral award. There is no requirement of following the procedural laws. The arbitral award is also treated as decree which can be enforced under any law. There are two kinds of arbitrations. They are domestic arbitration and international commercial arbitration. Domestic arbitration is that arbitration where there is no international component involved in the contract. International commercial arbitration is that arbitration which involves one foreign party or foreign place of execution of the contract or the parties have agreed themselves another place for the arbitration proceedings.

Contract is considered that it is a law created by the parties themselves for themselves. It is pertinent to mention here that the arbitration agreement is an agreement which has a separate entity from the regular contract. If the main contract is declared void then also the arbitration agreement stands and is enforceable. The importance of arbitration in the world has been on the rise. To be more precise is considered as a very suitable mode of avoiding litigation in courts.

In recent past, there have been criticisms across the world that arbitration has become a private affair. Here the stakes are high between the parties and the stakes are decided as a private affair. The arbitrators also mint money out of these high stakes of the corporate world. There have been economists who are writing and question in the increase in some kinds of arbitrations only. Before critically analysing the issues involved in the arbitration law, let us understand the arbitration process in European Union.

### **An Introduction to Arbitration**

To begin with arbitration is a mechanism or process through which parties resolve the disputes amongst them outside the formal legal system of courts. The arbitration is presided over by a neutral third party who is appointed by the parties themselves. The arbitration is binding in nature. In other words, parties are bound to accept the arbitral award. It is believed that arbitration is one of the constituent of alternate dispute resolution recognized

by the law, indeed it is as it provides a unique mode of resolving the disputes between the parties. Arbitration totally depends on the *lex fori* that is law of the forum. In other words the arbitration majorly depends on the national legal system of the country which holds the arbitration.

The major laws that are applicable in arbitration proceedings are New York Convention, 1958 and state laws that are parties agree to or are subject to are based on their nationality. It is pertinent to note that there are many other international instruments that play a vital role in shaping up of the arbitration of any country.

The main principle of arbitration proceedings is that there should be an arbitration agreement. In other words the parties should freely consent by the way of separate agreement for the application of arbitration law. The consent is so important in arbitration proceeding that the parties will only be subject to that arbitration proceeding which they have consented to. If there is any other modification done in the procedure other than the arbitration agreement a separate or fresh consent of the parties has to be obtained. It is pertinent to not that there is a requirement that the agreement should be in writing.

It is to be noted that the arbitration agreement bind the parties to the agreement. It does not bind the third persons to the contract. In other words, privity of contract is applicable on the arbitration agreement.

The tribunal comprises of one or more than one arbitrator. In few parts of the world the arbitral tribunal should have odd number of arbitrators. The arbitrators are appointed in accordance with the procedure agreed by the parties or it is decided by the national laws of the place of arbitration. It is to be noted that if the arbitration agreement is silent on the appointment of the arbitrators then subsequently parties cannot agree on any other procedure.

Generally parties opt for sole or single arbitrator or odd number of arbitrators. Each arbitrator is appointed by the parties and both the appointed arbitrator appoints the third arbitrator who also acts the presiding arbitrator. If there is only one arbitrator then that arbitrator must be appointed with the consent of both the parties.

There is no prescribed qualification for appointment of arbitrator. Any person can be appointed as an arbitrator. The only unsaid or unstated requirement for an arbitrator is that he should be

independent in his actions and impartial while dealing with parties as an arbitrator.

If there is an arbitration agreement, the national courts have no jurisdiction to try the matter. It is pertinent to mention here is that the courts can act as a facilitator in arbitration proceedings. Every party has a right to bring an action against any arbitral award in the state court but on the grounds that are acceptable under the state law. Arbitral proceeding is conducted on the basis of the arbitration agreement between the parties. The parties have the right to regulate or decide the procedure of arbitration. The procedural laws are not always applicable on the arbitration proceedings. This provides the autonomous nature to the arbitration proceedings.

Arbitral award is the decision of the tribunal after listening to the parties at length. The award can be preliminary in nature or final. It can also be partial as well as full award. Partial award is that award which decides one of the issues before the tribunal. The final award decides all the pending issues with the arbitration tribunal. Arbitral awards are of binding nature. They are binding only on the parties to the proceedings and are enforceable against them. The arbitral are also enforceable in foreign countries. The New York Convention, 1958 deals with the enforcement of foreign awards. The national or state laws have enacted the laws for the enforcement of these awards. The enforcement mechanisms are also created by the state authorities to enforce the arbitral awards.

What kind of matters that can be subject to arbitration is a very pertinent issue? All the matters are not arbitrable in nature. For instance, arbitration can be done for commercial disputes but arbitration cannot be done for criminal cases.

One of the special features of arbitration in Europe is that there is no difference between the domestic or international arbitration. If the arbitration is seated in Europe the rules and regulations are applied are same on both the kinds of arbitrations. The question of arbitrator is decided by the tribunal itself. The parties may raise an objection with regard to jurisdiction which can be decided by the state courts at later stage of the proceedings.

### **“Arbitration is not, and should not become, a law unto itself”: A discussion**

This statement which is a title of the lecture provided by Lord Mance, is an statement which questions the various conventions

of the united nations as well as the domestic law of the states across the globe. Criticisms are fruitful if they are taken in the right spirit and worked towards their eradication. Same is the requirement with the criticisms made by Lord Mance in his lecture regarding arbitration. In this part an effort has been made to understand the issues argued by Lord Mance in his lecture.

Lord Mance in his lecture advocated this idea that arbitration should not be an independent law as it lacks many aspects to be called as law. It was further advocated that the arbitration law lacks coherence. The title of the lecture delivered i.e. 'Arbitration is not, and should not become, a law unto itself' substantiates the above stated preposition. The main problem that exists with the legal system of arbitration is it lacks coherence as well as consistency. The coherence refers to the smooth functioning of this alternate dispute resolution. From the term consistency I mean that there are methods to ensure the certainty in the system of conducting arbitration. Here I would like to quote from the lecture of Lord Mance:

"I question both the coherence and the wisdom of theses advocating an independent or transnational system of arbitration, while detaching this from the web of existing legal systems whose inter-relationship is well established by rules of private or public international law and treaties."<sup>1</sup>

In arbitration, the ad hoc nature of arbitration and its finality and privacy militate against overall consistency. No general means as yet exist to ensure that arbitral decisions are consistent. In bilateral investment arbitration, there is nowadays more openness, but it too appears to be a field where decision-making by different tribunals may differ (on central issues such as what is an investment and what amounts to fair and equitable treatment)<sup>2</sup>

The above two stated paragraphs, questions the very basis of the concept of arbitration. These are the first two issues that are raised in the lecture of Lord Mance.

Third issue raised by the Lord Mance is with 'Law of the Seat'. He conceptually questioned the concept of law of the seat. He puts forth an argument by saying that the law of the seat is a concerto where the seat of the arbitration is selected that the law of that

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<sup>1</sup> Lord Mance that:-"Arbitration is not, and should not become, a law unto itself" 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer.

<sup>2</sup> *Id.*

seat will apply post arbitration. The important point that was made Lord Mance was that the parties have the discretion to choose the place of the arbitration even though that place has any link with the main contract in question. This issue is also linked with what is the role of the law of the seat that can be used in cases of international commercial arbitration.

Fourth argument that is made by the Lord Mance is that the Arbitration is independent of all the legal systems. This issue was raised by Lord Mance in the following words:

“... problem about treating arbitration as independent of any national legal system, particularly the law of the seat, is this appears irreconcilable with the New York Convention. The *Cour de cassation* in *Putrabali* thought it could avoid this problem, by relying on article VII of that Convention. Article VII provides that the earlier articles do not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law” of the enforcing court. The Court de cassation viewed this as enabling it to apply articles of the French Code of Civil Procedure which provide for enforcement of foreign awards without specifying the setting aside of an award at its seat as a cause for non recognition.”<sup>3</sup>

This issue is really pertinent as it questions the very existence of the relationship of arbitration with the municipal law of any state. Though Article VII of the New York Convention categorically empowers the parties to make their choice of the law of the seat but the law that is applicable will be independent from the law of the seat that is it will apply on the basis of nationality of the parties as well as the parties have an option of choosing a law which is neither part of the state law or any other norm of the international law. This freedom really dents the concept and importance of the law of the seat in arbitration.

The next point put forth by Lord Mance is that the Arbitrators do not administer justice. The justice is only administered by judges of any state. The question is what is the role of Arbitrators in the legal system? Is it to make parties reach a consensus or settlement? Or arbitrator act as a facilitator? Or an arbitrator act as a judge?

“Fourthly, Emmanuel Gaillard is correct that arbitrators differ from judges in that they do not administer justice as an organ,

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<sup>3</sup> *Id.*

on behalf or in the name of any state. But it does not follow that they administer justice as part of a separate legal system. Although consent is the hallmark of arbitration, we should not forget that consent is also a common basis of court jurisdiction. Even judges depend, though in a differing degree to arbitrators, on other bodies to recognise and enforce their decisions. Domestically, in countries subject to the rule of law, it is axiomatic that the state will recognise and enforce decisions of its own courts. Arbitrators, not being an arm of the state, depend on laws to that effect. But for court decisions to have any relevance abroad, arrangements must be made with other states, whether by treaty, statute or common law. Claimants who bring claims before common law courts, with broad powers to authorise service out of the jurisdiction, sometimes find that they have overstretched internationally. The fruits of success may be difficult to reach abroad, if the defendant does not submit the domestic jurisdiction. So even judicial authority is, like arbitral decision making – and the universe generally, relative. We do not suggest that this means that court authority needs further explanation in the form of some underlying international consensus or legal order. Arbitration is merely a more extreme case.”<sup>4</sup>

The pertinent question is being raised regarding the status of the arbitrators in the legal system. The main question that needs to be answered is that whether the arbitrators are supporters of legal system or judges or officers? The answer is they are devised to complement the system and ease the load of the system with their valuable experience.

The next concern that was raised by Lord Mance was that the Arbitration is detached from the law of the seat as it provides superseding powers to the parties. Lord Mance said:

“Fifth, any thesis which severs or denies that the existence of a special link between arbitration and its seat conflicts with, rather than promotes party autonomy. Where parties choose, or allow an institution or the arbitrators to choose on their behalf, a particular seat, how can they disclaim the attitude of the law of that seat? As noted, the English Arbitration Act 1996 operates on the basis that arbitration must have a seat. If England is the seat, the 1996 Act provides for the possibility of an appeal on a point of law, unless the parties have otherwise agreed. A theory of international arbitration which

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<sup>4</sup> *Id.*

looks only to the award, and ignore the attitude of the law of the chosen seat to the award upon such an appeal, undermines the parties' agreement."

The point raised by Lord Mance is well justified as the arbitration law itself empowers the parties to supersede the law. It can be inferred that the parties can create their own procedure and substantive law that is arbitrary to the procedure established by law. The pertinent question that is raised is can a consent be given by both the parties for the illegal act? The answer is always NO. So there is a need to rethink the purpose for the choice of the Law of the Seat as well the concept of illegality in law.

Last issue that is raised is that of the enforceability of the award in other jurisdictions of the world and the effect of upholding or the setting aside of the arbitral award by the Court established the state chosen as the law of the seat. Further Lord Mance clarifies the position of the English law by saying following words:

"The current English view is therefore that a foreign enforcing court may, consistently with the New York Convention, take a different view of an award to that taken by the law and courts of the seat, by relying on the word "may" in article V.149. But this is only in exceptional circumstances when justified on some recognized common law principle, and not as a matter of open discretion. In other circumstances, a decision of the law and courts of the seat setting aside an award will prevail."<sup>5</sup>

The pertinent issue that has been raised is that what is the status of an award that has been set aside by the court established in law of the seat? The question that is to be answered is that the courts established in other jurisdictions are bound not to follow the set aside arbitral award or they can be set aside the order passed by the court established in the law of the seat and enforce the arbitral award as it is. Another important issue that is raised is that when the arbitral award is declared valid by the court established in the chosen law of the seat, is there any boundation on other courts to follow or enforce the arbitral award.

The above raised issues are valid to the extent that they raise a serious doubt with the working of the modern arbitration system in Europe. The only point that is to be answered is that how much these valid points take away the right from arbitration law to be called as law.

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<sup>5</sup> *Id.*

## Conclusion

I would like to begin with the answer to the question that how much I agree with Lord Mance in his lecture titled as “Arbitration is not, and should not become, a law unto itself”. To an extent I agree and acknowledge with the issues that are raised by Lord Mance but I don’t agree to the conclusion that Arbitration is not, and should not become, a law unto itself. I strongly believe that there are always faults in the law but that does not mean that we should scrap the law. There is requirement for acknowledging the scope of improvement and working over it. By scraping the arbitration law we are to an extent stopping the evolution of law. I would like to further suggest few solutions to the issues that are raised by the Lord Mance and also would like to take the discussion further how the arbitration law can be improvised.

The concept of Justice is to provide interpretation of law for the public at large. But when we come near arbitration we cannot term it as justice as it is not applicable on the whole world as well as it is not an interpretation of law. It is only useful for the parties to the arbitration agreement. This can be termed as a private affair conducted on the expense of the parties to the agreement. The award is a kind of private document prepared by the arbitrators for only who are party to the arbitration agreement.

Lord Mance has rightly raised the issue of consistency in the arbitration system. The arbitration system lacks consistency as there are standards for providing any award. Neither the state rules are there on the subjective evaluation of the award nor any set criteria at international level to decide the matter. The system that exists today does not provide any kind of certainty in the arbitration system. To develop the faith of the public at large, there is a requirement of providing certainty to the people. The arbitration should be a complete process that should be able to handle all kinds of problems that come to the forum. There is a requirement of international standards to be laid down for providing consistency to the existing arbitration system.

To an extent the whole system lacks coherence. Coherence is the system developed for the smooth functioning of the arbitration per se. It seems that the process of the reaching of the arbitral award and enforcement of the arbitral awards does not have the actual relation amongst them. The system can be said that it has coherence if the system is able to develop a practical as well as speedy way of reaching a solution.

Another issue that is raised by Lord Mance is that of the role of the Law of the Seat. The crux of the issue lies with the effect of the judgment provided by the court on the validity of the arbitral award established in the Law of the seat. This judgment has any effect on the courts established in other jurisdictions. Is that dictum binding on other courts? Though, the New York Convention, 1958 is able to sort out this issue but its scope is only limited to the signatories of this convention. There can be an effort to create a *jus cogens* at the United Nations level or it can be decided as a matter of private international law that can be applied across the system uniformly.

It is pertinent to mention here that Article V of the New York Convention 1958 provides a presumption that the foreign Court will respect a decision of the Court of the seat of an Award, the word “may” implies that there is no compulsion to do so.

Article V reads as:

1. Recognition and enforcement of the award maybe refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
  - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
  - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
  - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in

- accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
    - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
    - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”<sup>6</sup>

To an extent this provides a losing party a hope to start another round of litigation for the enforcement of the award. There can be chance that the lost party wins the second battle in his world.

Another major problem that remains is that of the success rate in arbitration. This issue really takes away the consistency out of the system of arbitration. Success depends on the facts of each case. It does not depend on any law that exists in the system. This creates another issue with regard to the requirement of general procedure that can be followed during the arbitration proceedings. It is still debatable that the autonomy of the parties to decide the procedure is important or to bring consistency in the system. The autonomous nature of the arbitration agreement is one the main unique features of arbitration. The time has come to decide the priority and take the decision of the creating a system which is just and right.

The main objective of the Arbitration law is to provide an alternative dispute resolution which provides speedy, right solution to the dispute. The arbitration system is created as an alternative to the long, tedious, time consuming process of litigation. But once the award is declared or pronounced, it can be challenged, on the ground recognized by law, in the courts. The problem is the very object of the arbitration is forfeited when the process of arbitration is complete, arbitral award is pronounced and then the litigation starts to defend the arbitral award. Is it really the alternate dispute resolution? There is requirement to devise or create law that can be helpful to take out or minimize the role of litigation in the arbitration process.

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<sup>6</sup> Article V, New York Convention, 1958, *available at* <http://interarb.com/vl/p967047127> (last visited on 21.05.2016 at 9.15 pm).

Lastly, I would like to end this article with the words of Lord Mance where he concludes the essence of his premise:

“In short, an increasingly inter-connected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems. Arbitration already offers those engaging in it very substantial autonomy. Siren calls for complete or yet further autonomy should be viewed with scepticism. We – judges, arbitrators and lawyers – are engaged in a common exercise, the administration of justice for the benefit of litigants and society. A degree of order, coordination and inter-dependence is necessary and desirable, if this exercise is to be conducted efficiently and economically in a globalised world.”<sup>7</sup>

Lord Mance, has very rightly pointed out that there is a requirement of coordination amongst different organs of legal system. This will bring coherence, efficiency as well as the certainty to the system. The need of the hour is to develop a system in which the arbitration rules are amended on international level so that all the kinds of arbitrations (domestic as well as international) can become certain and consistent in nature.



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<sup>7</sup> *Supra* note 1.