ARBITRATION OR LITIGATION – RATIONAL FOR LEGAL DECISION MAKING

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ABSTRACT

Every legal system in the world can be broadly classified into two types: adversarial and inquisitorial legal systems. Both the legal system aims at dispensing justice but are different in adjudication and legal decision making.

In an adversarial system the parties in legal proceedings develop their own theory in the case and gather evidence to support their claims. The parties develop their own theory regarding the case and the lawyers play a pro-active roll in delivering justice to the-litigants. Here the role of the judges is passive.

In an inquisitorial system judge makes the centre-stage in dispensing justice. The role of the judge is active he/ she plays an active role between the parties.

And decides the case in the manner the evidences are presented.

The Alternative Dispute Resolution is one of the time of non-adversarial mode of resolving disputes

The history of ADR pre dates in Indian judiciary. The modern Indian judiciary was introduced with the advent of British colonial era as the English courts and English legal systems on the lines of English courts.

The Vedic age in India witnessed the flourishing of specialized tribunals such as Kula, shreni, and puga . I \n these institutions interest based negotiations dominated with neutral third party seeking to identify the underlying needs and concerns of the parties in dispute.

The types of ADR are:-

- Arbitration
- Mediation and conciliation.

Arbitration is a term derived from nomenclature of roman law . arbitration is a e arrangement private arrangement of taking dispute to led adversarial , less formal and more flexible forum

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and abiding by judgement of selected person instead of carrying it to the established court of justice.

Litigation can be stated as the practice of settling disputes legally between the two parties is termed as litigation.

Research Objective

The objective of the project is to find out the that the arbitration and legislation are rational for legal decision making which means that either they are suitable in our country for decision making or not and to find that out the research on the arbitration and legislation is done.

Research Question

CAN ARBITRATION AND LITIGATION CAN BE TAKEN RATIONAL FOR LEGAL DECISION MAKING ?

Scope

The scope of the project is to find out the that what is arbitration in India and legislation and to find whether they are rational in legal decision making.

Method of Research

The method used for research is secondary method where the information is collected from the internet and the books.

Hence it is a doctrinal source of research.

ALTERNATIVE DISPUTE RESOLUTION

It is a system refers to the use of non-adversarial techniques of adjudication of legal disputes. The methods in ADR are more speedier , informal and cheaper modes of dispensing justice when compared to the conventional judicial procedure. ADR provides a more convenient forum to the parties who can choose time , place and procedure for conducting the preferred dispute redressal process.

Types of ADR are:-

1. Arbitration
2. Administrative tribunals

ARBITRATION

It is a term derived from the nomenclature of roman law. Arbitration is a private agreement of taking disputes to a less adversarial , less formal, and more flexible forum and abiding by the judgement of a selected person instead of carrying it to the established court of justice.

PROCESS OF ARBITRATION

Arbitration can be chosen by the parties either by way of an agreement or through the reference of the court. The parties in the arbitration have the right to select the qualified expert known as the arbitrator. The process of dispute resolution through arbitration is confidential unlike the court proceedings which are open to public . This feature of arbitration make it popular especially for commercial disputes.

Decision rendered by the arbitrator is binding on both the parties and it is known ad arbitral award. Similar to a judgement given by a judge , the arbitral award is binding on the disputed parties . once the award is rendered , it is recognized and enforced akin to a court pronounced judgement or order. In addition to the arbitral award , the arbitrator also holds power and authority to grant interim measures, like a judge in the court. Theses interim measures are in the nature of temporary relief and may be granted while the legal proceeding are on-going in order to preserve and protect certain rights in the parties, till the final award is rendered.

There are 5 types of arbitration

1. Domestic arbitration:- arbitration between the Indian parties where the place is also in India and rules applicable are Indian.

2. Foreign arbitration:- conducted in a place outside India and award is required to be enforced in India.
3. Ad-hoc arbitration:- governed by parties themselves without recourse to formal arbitral institution. It may be domestic or international in character.
4. Institutional arbitraation:- An arbitration where the parties select a particular institution , which in turn takes the arbitration forward by selecting an arbitrator and laying out the rules applicable within the arbitration , eg., mode of obtaining evidence etc. there are several institutions to govern arbitration . examples of prominent institutions of arbitration include, The London Chamber of International Arbitration which had its offices across the world , including New Delhi.
5. Statutory arbitration:- arbitration which is mandatorily imposed on the parties by operation to particular law or statue , applicable to them.
6. International commercial arbitration.:- At least one of the party in dispute is of a country other than India. Arbitration with the government of a foreign country is also considered to be an international commercial arbitration. This form of arbitration has been defined specifically under section 2 (1) (f) of ARBITRATION AND CONCILIATION ACT,1996.

The Arbitration and Conciliation Act 1996 is the key law governing arbitration in India. It is modeled on the UNCITRAL model law. The act has four parts:

Part I sets out general provisions on domestic arbitration;
Part II addresses the enforcement of foreign awards (Chapter 1 deals with New York Convention awards and Chapter II with awards under the 1927 Geneva Convention);
Part III deals with conciliation; and
Part IV sets out certain supplementary provisions.
Parts I and II are the most significant and are based on the UNCITRAL Model Law and the New York Convention respectively.

The Arbitration & Conciliation (Amendment) Act, 2019 ("the 2019 Amendment"), which amends the Indian Arbitration & Conciliation Act, 1996 ("the Act"), came into force with effect from 9 August 2019. The Law Minister of India was recently quoted as saying in one of the press releases (after the Bill in support of the 2019 Amendment was introduced in the

lower House of Parliament), that the government intended to make India a hub of domestic and international arbitration by bringing in changes in law for faster resolution of commercial disputes.

The 2019 Amendment introduces Part 1A to the Act, which is titled as 'Arbitration Council of India' (Sections 43A to 43M) and which empowers the Central Government to establish the ACI by an official gazette notification (Section 43B). The ACI shall be composed of (i) a retired Supreme Court or High Court judge, appointed by the Central Government in consultation with the Chief Justice of India, as its Chairperson, (ii) an eminent arbitration practitioner nominated as the Central Government Member, (iii) an eminent academician having research and teaching experience in the field of arbitration, appointed by the Central Government in consultation with the Chairperson, as the Chairperson-Member, (iv) Secretary to the Central Government in the Department of Legal Affairs, Ministry of Law and Justice and (v) Secretary to the Central Government in the Department of Expenditure, Ministry of Finance – both as ex officio members, (vi) one representative of a recognized body of commerce and industry, chosen on rotational basis by the Central Government, as a part-time member, and (vii) Chief Executive Officer-Member-Secretary, ex officio (Section 43C(1)(a)–(f)). The ACI is inter alia entrusted with grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations (Section 43I).

QUALIFICATION OF ARBITRATORS

The ACI is also entrusted with the function of reviewing the grading of arbitrators (Section 43D(2)(c)). The qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule, as introduced by the 2019 Amendment (Section 43J). The Eighth Schedule stipulates nine categories of persons (such as an Indian advocate or cost accountant or company secretary with certain level of experience or a government officer in certain cases inter alia) and only those are qualified to be an arbitrator.

Thus, a foreign scholar or foreign-registered lawyer or a retired foreign officer is outrightly disqualified to be an arbitrator under the 2019 Amendment. For obvious reasons, foreign parties will be discouraged to opt for Indian institutional arbitration where the choice of candidates as their potential arbitrators is limited by nationality, likelihood of lack of experience and specialization – both academic and professional – in handling international arbitrations.

LITIGATION

Litigation is the term used to describe proceedings initiated between two opposing parties to enforce or defend a legal right. Litigation is typically settled by agreement between the parties, but may also be heard and decided by a jury or judge in court.

Contrary to popular belief, litigation is not simply another name for a lawsuit. Litigation includes any number of activities before, during, and after a lawsuit to enforce a legal right. In addition to the actual lawsuit, pre-suit negotiations, arbitrations, facilitations and appeals may also be part of the litigation process.

LITIGATION BEFORE THE LAWSUIT

The conduct of lawsuit is known as Litigation. The plaintiffs and defendants are called litigants and the attorneys representing them are called litigators.[2] The term litigation may also refer to a Criminal procedure.

Litigation begins the moment someone decides to formally enforce or defend his or her legal rights. In most cases, this happens the moment a party hires an attorney to represent their interests. Most attorneys engage in a variety of "pre-suit" litigation activities. These can include many things, from writing a letter on a client's behalf called a demand letter, to demand that a party compensate a victim for economic or physical injury, to filing a Notice of Eviction with a local court. Pre-suit litigation is subject matter specific and varies depending on the circumstances surrounding a particular case. However, there are several steps in litigation that occur in nearly every case.

The first step in any litigation is investigation. Litigation is meaningless without information about the harm that occurred. Attorneys, and parties, often conduct extensive independent investigations into the facts and potential outcomes of a particular case prior to filing suit. A thorough pre-suit investigation focuses the issues in the case and satisfies the wronged party and his attorney that the harm was indeed caused by the potential defendant and that the law provides for a remedy. Knowing the facts of what occurred and how and why the law provides a remedy allows the wronged party to present the case to the party who caused the harm effectively. It is also the beginning of the wronged party's preparation to present the facts and law to a court of law.

ARBITRATION AND LITIGATION RATIONAL FOR LEGAL DECISION MAKING

India is a common law country with an adversarial dispute resolution system. While litigation and arbitration are the usual methods of dispute resolution, parties can also choose conciliation or mediation either before or anytime during such proceedings.

Arbitration and litigation both are rational for legal decision making but if we see arbitration is much speedier form than litigation. According to the recent study by the Federal Mediation and Conciliation services the average time from filing to decisions was about 475 days in the arbitral case while a similar case took 18 months to three years to wend its ways through courts.

Arbitration is the process which is very different from litigation arbitration is basically made for solving disputes between the two businesses.

The arbitration is process in private between two parties and is informal while litigation is a formal process in courtroom.

Arbitration is fairly quick process then litigation , litigation may take years to solve particular disputes.

Arbitration and litigation both are rational for legal decision making both are suitable in their own ways .

Arbitration is rational for solving disputes between the business companies

While litigation is rational for solving disputes related to crime and which are of public importance.

But the truth is litigation is quiet slower in process compared to arbitration.

As the population is increasing day by day so the laws and procedures also become obsolete in litigation so therefore arbitration is supported in that case

As also there are lots of cases so most of the cases remain pending in litigation.

Hence both the process are rational for legal decision making in other ways

CONCLUSION

The conclusion which can be drawn out is that both arbitration and litigation and rational for legal decision making. Arbitration is the process of solving disputes privately between the parties and it is used basically to solve the commercial disputes.

While litigation is the process of solving disputes of public importance and there is no private arrangements for solving a dispute there is a courtroom where all the disputes are being solved.

Hence arbitration is suitable for commercial disputes decision making while litigation is rational for making decisions on the cases which are of public importance.

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