CHAPTER – 3
CONCEPT & EFFICACY OF ARBITRATION

Following the various description of ADR in previous chapter the researcher would investigate the concept of arbitration and efficacy of arbitration in particular in this chapter.

3.1 CONCEPTUAL TRAJECTORY OF ARBITRATION

Arbitration is essentially a settlement of disputes between parties by somebody, be it a person, an individual or a group of persons or an institution on which the parties repose confidence.\textsuperscript{352} The law of arbitration is based upon principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute domestic tribunal for adjudication thereof.\textsuperscript{353} Arbitration is the means by which parties to a dispute get the same settled through intervention of third person who may or may not be a permanent arbitral institution.\textsuperscript{354} Arbitration is one of the oldest systems of alternative to the traditional state administered court litigation. Arbitration is a process which is carried out pursuant to an agreement to arbitrate.\textsuperscript{355} Arbitration is a private dispute resolution method in which the disputants appoint an independent third party neutral, referred to as an “arbitrator”. The arbitrator(s) sits as an arbitral tribunal in which there may be more than one arbitrator. The disputants give the arbitral tribunal powers backed by legislation, to make a binding decision for them. Arbitration is a mechanism for resolution of disputes which takes place, usually in private, pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so agreed, other considerations, after a fair hearing such decision being enforceable at law.\textsuperscript{356} It is a private, generally informal and non judicial trial procedure for adjudicating dispute.\textsuperscript{357} It is non judicial because the arbitrator while acting judicially does not possess judicial powers of the court.\textsuperscript{358}

\textsuperscript{352} Supra Note 54, at 43.
\textsuperscript{353} Fazallay Jivaji Raja v. Khimji Poonja & Company, AIR 1934 Bom. 476.
\textsuperscript{354} Ibid.
\textsuperscript{355} Supra Note 54, at 44.
\textsuperscript{356} Ibid.
\textsuperscript{357} Ibid.
\textsuperscript{358} Ibid.
Arbitration is neither negotiation nor mediation. The parties confer upon the arbitrator full authority to adjudicate disputes i.e. to render a final disposition on the matters submitted to that can be enforced through coercive legal means. 359 Once the parties entrust the arbitral tribunal with the authority to rule, they subject to a possible settlement relinquish control of the dispute, and of its resolution to the arbitrators. 360 The parties have control in determining the procedure for conducting the arbitral proceedings. The parties can determine the form, structure, procedure and other details like language, place of arbitration and the manner in which evidence shall be taken etc. Thus parties have autonomy in conducting arbitral proceedings. The arbitral award is final and binding on the parties and the parties can enforce it as if a decree of the court.

The arbitration was evolved as an alternative to litigation. Access to courts is indispensable in the spheres of criminal, administrative and constitutional law, as courts are important guarantors of justice in these areas. But litigation is not always necessary or expedient in the private sphere, namely in matters regulated by civil and contract law. Equal partners of these relations have an opportunity to settle their disputes on their own or to use other methods of settling disputes. 361

Arbitration presents an alternative to the judicial process in offering, procedural flexibility. It also ensures confidentiality of all matters relating to the arbitral proceedings except where this disclosure is necessary for purposes of implementation and enforcement. 362 Fundamentally, however it is nonetheless the same in that the role of the arbitrator is judgmental. 363 The function of the Judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved, so much as to apportion responsibility for that problem.

359 Ibid.
360 Ibid.
361 Supra Note 50, at 7-8.
362 Supra Note 42, at 91.
363 Ibid.
Among the reasons for seeking an alternative to court litigation, the most important factor, in the transnational context, is hope for simplified commencement of proceedings and service of process, neutrality, and facilitated taking of evidence.\textsuperscript{364}

### 3.2 ESSENTIALS OF ARBITRATION

There is no internationally recognized definition of arbitration.\textsuperscript{365} Different commentators have defined arbitration differently. There are, however, four core requirements of the concept of arbitration viz, an arbitration agreement; a dispute; a reference to a third party for its determination; and an award by the third party.\textsuperscript{366} The parties must have an arbitration agreement in place before they can commence. The arbitration agreement can either be contained in a dispute resolution clause embodied in the main contract (pre-dispute) or form the subject matter of a submission agreement after the dispute has arisen (post-dispute).\textsuperscript{367} The Supreme Court of India in \textit{K.K.Modi v K.N. Modi}\textsuperscript{368} also stated that it is not possible to give definition of arbitration instead it pointed out attributes of an arbitration agreement. Relying on the passage from the book of Mustill and Boyd on Commercial Arbitration the Apex Court pointed out that in a complex modern State there is an immense variety of tribunals, differing fundamentally as regards their compositions, their functions and the sources from which their powers are derived. Dealing with tribunals whose jurisdiction is derived from consent of parties, they list, apart from arbitral tribunals, persons (not properly called tribunals) entrusted by consent with the power to affect the legal rights of two parties inter se in a manner creating legally enforceable rights, but intended to do so by a procedure of a ministerial and not a judicial nature (for example, persons appointed by contract to value property or to certify the compliance of building works with a specification). There are also other tribunals with a consensual jurisdiction whose decisions are intended to affect the private rights of two parties inter se, but not in a manner which creates a legally enforceable remedy (for example, conciliation tribunals of local religious communities, or persons privately appointed to act as mediators between two disputing persons or groups). Further agreeing with Mustill and Boyd the Supreme Court listed some of the attributes which

\textsuperscript{364} Ibid.
\textsuperscript{365} Ibid, at 95.
\textsuperscript{366} Ibid.
\textsuperscript{367} Arbitration and Conciliation Act, 1996, s. 7.
must be present for an agreement to be considered as an arbitration agreement, though these attributes in themselves may not be sufficient. They have also listed certain other considerations which are relevant to this question, although not conclusive on the point.

The Supreme Court held for an agreement to be considered as an arbitration agreement the following attributes must be present.

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

It further held apart from above attributes some other factors such as, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law are relevant.
The question also arises as to how to distinguish between an expert determination and arbitration. The Supreme Court quoted following text from Russell on Arbitration\textsuperscript{369} “Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such "as 'arbitrator', 'arbitral tribunal', 'arbitration' or the formula 'as an expert and not as an arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive... - Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert; .... An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion...."

Thus the essential for the arbitration would be an agreement between the parties to get their dispute of the nature mentioned in the said agreement adjudicated through arbitration. The arbitrator is therefore termed as a creature of an agreement. The source of power of an arbitrator is an agreement between the parties to dispute. Arbitrator cannot travel beyond the scope of the arbitration agreement. Unlike Courts which has inherent jurisdiction to take cognizance of any dispute of civil nature, the jurisdiction of arbitrator is limited within the ambit of arbitration agreement. The Courts on the other hand do not need conferment of the jurisdiction by statute to take cognizance of civil dispute; it is inherent in it. One needs an authority of law to take

\textsuperscript{369} SUTTON DAVID ST JOHN, KENDALL JOHN, GILL JUDITH, RUSSELL ON ARBITRATION 37(21\textsuperscript{st} ed., Sweet and Maxwell, 1997).
away the jurisdiction of the civil courts.\textsuperscript{370} The courts are bound by the rules of procedure in conducting the matter.

The parties are bound by an agreement to settle the dispute through arbitration. If a party to an arbitration agreement moves judicial authority relating to the matter covered by the arbitration agreement the other party may object to adjudication of such dispute and pray to refer the dispute to the adjudication by arbitrator. \textsuperscript{371} It is obligatory on judicial authority to refer the dispute to arbitration. The judiciary recognizes the arbitration agreement and shall refer the dispute to be decided by an arbitrator.

Also the award declared by the arbitrator is not open to challenge on merits. The recourse against the arbitral award is on limited grounds and the court does not sit as an appellate court over the arbitral award. The award passed by an arbitrator shall be enforceable as a decree.

\section*{3.3 Arbitration at International Level}

At the international level also a need was felt to recognize the arbitration agreement and to honour the arbitral award passed in one country if sought to be enforced in another country. The arbitral award in an international commercial arbitration when passed in a country where it is sought to be executed, it is domestic award. When an arbitral award in an international commercial arbitration is sought to be executed in a country other than that in which it is passed, it is foreign award. Let us examine the position in this regard at international level.

\subsection*{3.3.1 Geneva Convention}

With the growth of International Trade and Commerce, there was an increase in disputes arising out of such transactions being adjudicated through Arbitration. One of the problems faced in such Arbitration, related to recognition and enforcement of an arbitration agreement and Arbitral Award made in one country by the Courts of other countries. This difficulty was sought to be removed through International Conventions. The first such International Convention was the Geneva Protocol on

\textsuperscript{370} Code of Civil Procedure, 1908, s. 9.
\textsuperscript{371} Arbitration and Conciliation Act, 1996, s. 8.
Arbitration Clauses, 1923, popularly referred to as the 1923 Protocol. It was implemented w.e.f. 28th July, 1924. This Protocol was the product of the initiative taken by the International Chamber of Commerce (ICC) under the auspices of the League of Nations. The 1923 Protocol sought to make arbitration agreements and arbitration clauses in particular enforceable internationally. It was also sought to ensure that Awards made pursuant to such arbitration agreements would be enforced in the territory other than the state in which they were made. The 1923 Protocol proved to be inadequate. It was followed by the Geneva Convention on the execution of Foreign Arbitrated Awards, 1927 and is popularly known as the Geneva Convention of 1927. This convention was made effective on 25th July, 1929. India became a signatory to both the 1923 Protocol and the 1927 Convention on 23rd October, 1937. To give effect to both the 1923 Protocol and 1927 Convention the Arbitration (Protocol and Convention) Act, 1937 was enacted in India. Again a number of problems were encountered in the operation of the 1923 Protocol and the 1927 Geneva Convention. It was felt that there were limitations in relation to their fields of application. Under the 1927 Geneva Convention a party in order to enforce the Award in the Country of an origin was obliged to seek a declaration in the country where the arbitration took place to the effect that the Award was enforceable. Only then could the successful party go ahead and enforce the Award in the country of origin. This led to the problem of double exequatur, making the enforcement of arbitral awards much more complicated.

3.3.2 New York Convention

In 1953, the International Chamber of Commerce (ICC) promoted a new treaty to govern International Commercial Arbitration. The proposals of ICC were taken up by the United Nations Economic Social Council. This in turn led to the adoption of the convention on the Recognition and Enforcement of Foreign Arbitral Awards at New York in 1958 (popularly known as the New York Convention). The New York Convention is an improvement on the Geneva Convention of 1927. It provides for a much more simple and effective method of recognition and enforcement of foreign arbitral awards. It gives much wider effect to the validity of arbitration agreement and enforcement of awards passed by an arbitrator in an international commercial arbitration. This convention came into force on 7th June, 1959. India became a State Signatory to this convention on 13th July, 1960. In India the Foreign Awards
(Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention.

The significant feature of international commercial arbitration governed under New York Convention is its high level of enforceability. Arbitral awards are enforceable in domestic courts of many states by virtue of the New York Convention on Arbitral Awards. This Convention constitutes the backbone of the international regime for the enforcement of foreign awards. More than 150 countries have signed/ratified this convention.

This convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. It is also applicable to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. It mandates each contacting State to recognize an agreement in writing under which the parties undertake to submit to arbitration all differences which has arisen or which may arise between them.\(^{372}\) It also obliges the contracting State to recognize arbitral award as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.\(^{373}\) Under the convention the recognition and enforcement of arbitral award can be refused only if the party who opposes proves the conditions mentioned in the said convention.\(^{374}\)

Though the countries have signed the convention each country has enacted statute on arbitration to cater to its domestic needs. Therefore there was large disparity in the domestic laws of arbitration of different countries. There was no uniformity of the law.

\(^{372}\) ARTICLE II(1) of New York Convention– Each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

\(^{373}\) ARTICLE III of New York Convention- Each contracting state shall recognize arbitral awards binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

\(^{374}\) Article V of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
3.3.3 UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly of the United Nations in December 1966.\(^{375}\) This is a ‘core legal body within the United Nations system in the field of International Trade Law, to co-ordinate legal activities in this field in order to avoid duplication of effort and to promote efficiency, consistency, and coherence in the unification and harmonisation of trade law.’ Internationally, the Arbitration Law developed in different countries to cater for the felt needs of a particular country. This necessarily led to considerable disparity in the National Laws on arbitration. Therefore, a need was felt for improvement and harmonization of National Laws which were, often, particularly inappropriate for resolving international commercial arbitration disputes.\(^{376}\) The preparation of a Model Law on arbitration was considered the most appropriate way to achieve the desired uniformity. It is suggested that an UNCITRAL Model Law on arbitral procedure would, if implemented at the national level, solve many of the problems referred to. It would also establish universal standards of fairness. Moreover, such Model Law would prevent some, if not all, of the difficulties detected in the survey on the application and interpretation of the 1958 New York Convention.\(^{377}\)

With these objects in view, Model Law on International Commercial Arbitration (the Model Law) was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st June, 1985 at the end of the 18th Session of the Commission. The General Assembly in its Resolution A/40/72 on 11th December, 1985 recommended that all States give due consideration to the Model Law on international commercial arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. The General Assembly of the United Nations in the said resolution recognised the value of the arbitration as a method of settling the disputes arising in international commercial relations.

\(^{375}\) General Assembly resolution no. 2205 dated 17th December 1966.
\(^{376}\) A/CN/9-169
\(^{377}\) Ibid.
The explanatory note by the UNCITRAL Secretariat refers to the recurring inadequacies to be found in outdated National Laws, which included provisions that equate the arbitral process with Court litigation and fragmentary provisions that failed to address all relevant substantive law issues. It was also noticed that even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. It further mentions that while this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met. There was also unexpected and undesired restrictions found in National Laws, which would prevent the parties, for example, from submitting future disputes to arbitration. The Model Law was intended to reduce the risk of such possible frustration, difficulties or surprise. Problems also stemmed from inadequate arbitration laws or from the absence of specific legislation governing arbitration which were aggravated by the fact that National Laws differ widely. These differences were frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. It was found that obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances, often expensive, impractical or impossible.

As its name suggests, the Model law is only a “model”, i.e. a prototype of a law on international commercial arbitration, which can be adopted verbatim or only partially. This consequence crucially distinguishes it from a convention, which apart from certain “reservations” can generally only be ratified verbatim. 378 Sixty one countries including India have adopted the Model law.

Neither arbitration agreements nor arbitral awards are intrinsically enforceable. Arbitration is effective as a dispute resolution process only because there is a comprehensive legal system of bilateral and multilateral conventions and treaties and

national laws and arbitration rules which supports it. If it were not for this system, ‘arbitration in the sense that it leads to a “binding” award could not exist’. 379

Numerous conventions, treaties, international instruments and national laws ensure the enforceability of agreements to arbitrate by requiring national courts of accepting countries to refer to arbitration disputes that are the subject matter of a valid arbitration agreement. National courts are bound to stay court proceedings brought in breach of an agreement to arbitrate on the application of the party against whom such proceedings have been commenced and so, indirectly, to compel a party to comply with the arbitration agreement.380

3.4 DISADVANTAGES OF ARBITRATION
As an adjudicative remedy, however arbitration shares many of litigation’s disadvantages. Unless it produces a settlement while unfolding, arbitration generates winners and losers. Despite attempts to use decision making processes that respect ongoing business associations and arbitrators’ oft-criticized tendency to render compromise decisions, arbitration more often ends-rather than repairs commercial relationships. Losers usually do not want to do further business with companies that defeat them in adjudicatory battles.381 Arbitration also presents general adjudication disadvantages, including sacrificing outcome control by delegating it to external decisions makers. Resolution by arbitration focuses on backward looking facts, evidence, and arguments asserting and defending legal rights rather than on present and future development of beneficial business solutions. It adopts formal, legalistic frames that require the expertise of lawyers, and it often diverts time, money, and energy to ancillary procedural quarrels. Unlike litigation, arbitration seldom produces outcomes that establish precedent or articulate influential business policy.382 In addition oftentimes arbitration is neither less expensive nor faster than litigation.383

380 Ibid.
381 Supra Note 84, at 1251 & 1259.
382 Ibid.
383 Ibid, at 1251 & 1260.
The criticisms are also leveled against the international arbitration due to high costs; sets of procedural rules with unnecessary or dangerous provisions providing too many opportunities to create incidents; excessive bureaucracy imposed by the arbitration institutions; appointment of arbitrators with little knowledge of the business, country or law concerned; continual self appointment of the same people; tendency for advisors and arbitrators to mindlessly follow ‘Anglo-Saxon’ practices (not necessarily properly understood or applied); delaying tactics; a plethora of written submissions, hearings, witnesses, expert opinions and so forth.\textsuperscript{384}

Justice D.A. Desai of the Supreme Court of India expressed his anguish in protracted arbitration and stated\textsuperscript{385} “PROTRACTED, time-consuming, exasperating and atrociously expensive court trials impelled an alternative mode of resolution of disputes between the parties: arbitrate - don't litigate. Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a judge of the choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words of Edmond Davis, J. in Price v. Milner, these may be disastrous proceedings.”

The drawback of arbitration is lack of confidentiality, since the procedure and award may create the right to go to the courts.\textsuperscript{386} Further there may be a lack of interim award in case of emergency; moreover awards may be worthless because they can never be enforced or do not provide real solution.\textsuperscript{387}

\section*{3.5 CONCLUSION}

Thus it is clear that the arbitration as an adjudicatory technique is well supported by the international conventions and even by domestic laws. The agreement to resolve the dispute through arbitration itself is recognized and can be enforced. The award declared by the Arbitral tribunal is recognized and can be enforced or executed both domestically as well as internationally. Though these are advantages of arbitration but

\textsuperscript{384} Supra Note 51, at 26.
\textsuperscript{385} Ramji Dayawala & Sons (P) Ltd. v. Invest Import, 1980 DGLS (Soft.) 436 =AIR 1981 SC 2085.
\textsuperscript{386} Supra Note 51, at 26.
\textsuperscript{387} Ibid.
its greatest disadvantage is that it breaks the relationship between the parties as it is adjudicatory method. It is time consuming and costly.

In the next chapter the researcher deals with the efficacy of ADR in enforcement of settlement agreement arrived at in successful ADR.