# Cultural Ethos of Commercial Dispute Redressal Mechanism with Particular Perspective of Commercial Arbitration

**Ahtshamuddin Ansari**
*Ph.d Scholar, Deptt.of Commerce, Meerut College, Meerut.*
*Email:*

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**Ahtshamuddin Ansari**

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***Abstract***

*The cooperation and assistance of neutral persons in resolving the conflicts between constituents of human society, in every sphere of human life has ever been present. It may be named as helping hand of a middle man who enjoys trust of conflicting parties. It is known in human history as third party decision and nowadays it is termed as arbitration method of resolving dispute. In modern times it is regarded as private and efficient method, globally acknowledged a method of resolving international business disputes. In this types of redressal method parties themselves choose their judge. This dispute resolution system gives parties an opportunity and forum to settle their disputes through their own desires process. Party autonomy devoid of imposition is key principal of this redressal mechanism.*

## Introduction

The cooperation and assistance of neutral persons in resolving the conflicts between constituents of human society, in every sphere of human life has ever been present. It may be named as helping hand of a middle man who enjoys trust of conflicting parties. It is known in human history as third party decision and nowadays it is termed as arbitration method of resolving dispute. In modern times it is regarded as private and efficient method, globally acknowledged a method of resolving international business disputes. In this types of redressal method parties themselves choose their judge[1]. This dispute resolution system gives parties an opportunity and forum to settle their disputes through their own desires process. Party autonomy devoid of imposition is key principal of this redressal mechanism[2].

The ancient society with limited market economy witnessed the facts of stagnation in the sphere of in economic growth[3]. Sometimes it was due to the disagreement among the parties in their daily trading activities and at another time, due to the non fulfillment of promised made in agreement. This type of situation gave rise to conflicts, disputes, disorder and anarchy disturbing the peace and tranquility. The eradication of anarchical order makes way for flourishing the trade and commerce; consequently bring prosperity in the society. When we peruse the causes of intervention by East India Company in the affairs of Indian governance at that time we find that it was due to administrative destabilization which was not serving the economic interest of the East India Company as its sole motive was to earn and gain profit by marketing the product of England. Hence peaceful social order and solace of mind of trading community is an ingredient of the enhancement commercial transactions. Hence, endeavors had ever been made to unite the parties at loggerhead by bringing them at the platform of negotiation and making them convinced for private compromise.

This notion of private compromise has roots of commercial arbitration as a method of resolving disputes. Sometimes this redressal norm is regarded as in conflict with the existing adjudicating system[4]; however its deeper study reveals that this system is supplementary to the judiciary. At trans-national level the trading community has accepted this method (arbitration) of resolving domestic and transnational commercial and business disputes. The sojourn of commercial arbitration had not been smooth. It treaded complicated and uneven path in its growth over a long period from JAY TREATY of 1794 to the UNCITRAL model law relating to commercial arbitration.

In this paper we propose to investigate the historical factors responsible for the development of commercial arbitration as an effective redressal norm prevailing in the world commerce.

## Historical Antecedents of Redressal Norms

### Trditional Indian View

Under Hindu Law arbitration or mediation as an alternative to dispute resolution by the municipal courts has been prevalent in India since ages[5]. In the *Brhadranayaka Upanishad*, sage[6]*Yajnavalkya* refers to the various types of arbitral bodies like (a) The *Puga*( a body of persons belonging to the different sects and tribes but residing in the same locality), (b)The *Sreni*(an assembly of tradesmen) and artisans belonging to different tribes but connected in some way with each other and (c) The *Kula*(a group of persons bound by family ties). Such bodies were known as panchayats and their members were known as *panchas*[7]. Proceedings before these bodies were of informal nature, free from the cumbersome technicalities of the municipal courts.

Moreover, as the members of these bodies were drawn from the same locality and often from the same walk of life as the parties to the dispute, the facts and events could not be concealed from them[8].

The decisions of these bodies were final and binding on the parties. An aggrieved party could, however, go in 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[9].

### Islamic Rudimentary Norms

During its formation stage Islam provided a system for resolution of family dispute through negotiation, mediation and arbitration. During six century A.D. Islamic legal system asked its followers to adopt methods of private settlement for matrimonial discord. It made it incumbent upon the followers to appoint *Hakam*(neutral middle) man to assist and accommodate the conflicting rights of the disputing parties. That may, safely be called arbitral entity. This system of resolution of conflicts came to India along with the arrival of Arab traders at coastal areas of western India, better known as Kerala. In north-west India it was accompanied with the Middle-East and West-Asian invaders. That was colored in person culture and coined the concept of *Saalis*-the arbitrator. It is misnomer to call it as a western legal concept. It was known to Indians before the Magna Carta emerged in Europe: The earliest law on arbitration in England was made in 1697.[10]

### British Impact On Redressing Mechanism

The chronicle growth of arbitration under British period was well managed through various regulations ; legislative history of the notion of arbitration in India started with the regulation enacted by East India Company made for Bengal, Madras and Bombay. The Bengal regulation of 1772 and 1780 contained the provision on

arbitration. Under Regulation of 1781 provision was laid down requiring the judges to prevail upon the parties to submit their disputes to arbitration and the person to act as arbitrator to be mutually agreed upon the parties. The regulation of 1787 contained rule for arbitration to be conducted by a person of credit and character. Under Bombay Regulation of 1832, it was necessary for the arbitration to be in writing and arbitrator was named. In 1883, the Bengal regulation empowered settlement officer to refer dispute to arbitrator[11].The Code of Civil Procedure of 1859 and 1892 dealt with the working of arbitration with or without the intervention of the court. These enactments did not take care of the dispute supposed to arise in future. This drawback was removed by the Arbitration Act, 1899. The application of this act was extended to commercial towns. This journey of arbitration legislation was ended in 1940. Under colonial rule, the important law was enacted in 1940, namely The Arbitration Act, 1940. Under this legislation scattered Indian law on arbitration was consolidated on the lines of the English Arbitration Act, 1934.

**Evolution of Modern Concept**

In the western part of the globe development of non-judicial redressal norm had been the offshoot of the Jay Treaty of 1794. John Jay the architect of this treaty incorporated the arbitration provision into the Treaty designed for international justice. The Jay Treaty arbitrations has been treated as the "dawn of contemporary international arbitration"[12]. "The United States and Great Britain for the first time agreed to use arbitration in their relations with each other when they concluded their first commercial treaty, usually called Jay's Treaty in 1794."[13]Another land mark treaty in this field is known as "Treaty of Ghent" which was concluded in 1814 between the United States and Britain to redress the grievances of each other arose due to war of 1812. British leaders agreed that an arbitrator should deal with the matter and succeeded to end the slave trade.

Trade and Commerce in ancient India had enlarged trans-national dimensions establishing a flourishing and sound economy at that time. One and the foremost factor in the development of trade and commerce at that time was a simple and non-cumbersome system of resolving commercial and contractual conflicts arose among traders – native as well as aliens. The practice of referring matters to *panch*had been widely put into action to decide the dispute. During British rule the liberty and independence of trading eroded and they curtailed the expansion of export from India due to imperial design of Britons. The Indian Arbitration Act, 1940 was enacted during British rule. Most part of it regarded Indian trade as a limited adjunct of the British economic system. The law was shaped in the classical mould with freedom to the courts to exercise a substantial supervision over the course of the arbitration process, and with fairly wide powers of judicial interference with the arbitration award. Upon the close of the Second World War, a novel trading ethos began to

appear. Newly emerging independent nations gave rise to an extended international community. The charter of U.N has laid emphasis on the economic dimensions of international life and global interdependence. The global spiral of trade and commerce saw the birth of new concepts of commercial jurisprudence and legal practices[14]. The back logs of the contractual and commercial disputes compelled the trading community to find out new means for settlement. The perceptions of world over suggested a greater use of alternative system of dispute resolution especially in matters of trade and commerce[15].

The alternative dispute resolution system presumed to be less costly , save time, mitigate irritation, more simple in procedure. These perceptions caused the enactment of the Indian Arbitration Act, 1940. But growing complexities of mercantile activities and market forces exposed the weakness of this enactment and made it out dated. There was a need to have an Act "more responsive to contemporary requirement". It was felt that "economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of time". Consequently, the Act of 1940 was replaced by the Arbitration and Reconciliation Act, 1996.

The phenomenal growth in our commercial and industrial sector, paves the way for our economy to be opened up to foreign investment in a big way. Present marketing trends made the world economy very competitive resulting in commercial disputes involving high stakes. "Unless, there is an efficient mechanism for resolving them speedily and effectively, progress will be retarded".

The formal commercial system had suffered from problems of high costs expensive delays in the resolution of contractual disputes responsible for slow commercial development. The formal judicial system has failed to give impetus to the fast track economic growth. One of the solutions to the problem was seen in adopting commercial arbitration mechanism as a wing of alternate dispute resolution system. It is; however, commonly felt that the full potential of arbitration has not been realized in India.[16] In this hour of globalization the non-cumbersome procedure of adjudication and reasonable rules of the law pertaining to industrial relation has been deemed as necessary elements by any mercantile organization investing in Indian economy. This highlights the importance of this study as fast settlement of disputes has become all the more important for growing economy to attract foreign investors. In this proposed research work the focus of study will be on how the procedure of international commercial arbitration can be simplified and how it can be made more effective, unless costly and time saving.

**U.N Design of Arbitration**

To consolidate the scattered provisions in transnational legal systems about remedial mechanism of commercial disputes through Arbitration; United Nations

prepared a model rules and law for the unification and simplification of the law of commercial arbitration. They are known as UNCITRAL Rules and Model Law.

The UNCITRAL Rules deal with every aspect of arbitration from the formation of the tribunal to rendering an award. They were intended to provide the guidelines and flexibility for the smooth operation of arbitral proceedings. When approved, these rules reflected what the drafters believed were the accepted and the desired independent standards for use in international arbitration. Toady these rules are in fact reflective of what actually transpires in international arbitration practice and provide a milestone for review in much arbitration under other systems. The next effort came with the introduction of the UNCITRAL Model Law of 1985 which attempted at bringing uniform, harmonized and modern commonly accepted standards for international arbitration with three basic features that is party autonomy, minimum judicial intervention and maximum judicial support. The minimalist approach and the primacy of the principle of party autonomy, as embodied in the Model law, have now been recognized in all modern arbitration laws. They reshape the scope of court's power[17] in respect of assistance and supervision. The scope of court assistance is generally confined to the appointment and removal of arbitrators, grant of provisional relief and the collection of evidence. The supervisory powers of a court are limited generally to the challenge to jurisdiction, removal of arbitrators, and appeal from, setting aside and enforcement of arbitration awards. In addition, no derogation is allowed from the due process requirements and there is a limit in each jurisdiction to matters, which are arbitrable.

In India also to attract the confidence of the international mercantile community in the context of growing volume of India's trade and our commercial relationship with the rest of the world after the new liberalization policy of the Government, the Arbitration and Conciliation Act, 1996 was passed. This Act is in harmony with the UNCITRAL Model Law on International Commercial Arbitration.

**Kinds of Redressing Norms Pertaining To Commercial Contract**

**Ad-hoc Arbitration**

Ad hoc arbitration refers to "arbitration" where the parties and the arbitral tribunal will conduct the arbitration according to procedures which will either be agreed by the parties or, in default of agreement, laid down by the arbitral tribunal at a preliminary meeting once the arbitration hasbegun. However, this is not the only way of proceeding. There are many set of rules available to parties contemplating arbitration, including the rules of their own trade associations". An agreement to refer either future or existing disputes to arbitration without an arbitral institution being specified to supervise the proceedings, or at least to supply the procedural rules for the arbitration. This second sense is more common in international arbitrations.

Thus, if, an arbitration agreement stipulates that the arbitration shall administer by a 'permanent arbitral institution', it is institutional arbitration. In the absence of such stipulation, the arbitration is 'ad hoc'. 'Ad hoc arbitration' is, therefore, arbitration agreed to and arranged by the parties themselves without recourse to an arbitral institution. Such arbitration takes place in accordance with the procedure provided under the national Acts and the rules framed under them. It is, however, open to the parties to agree to adopt the rules framed by a particular arbitral institution without submitting its disputes to such institution. "Ad hoc arbitration" may be domestic or international commercial arbitration.

**Institutional Arbitration**

'Institutional arbitration' is an arbitration administered by an arbitral institute, a body making special provisions for the purpose of conducting arbitration. The parties[18] may stipulate, in the arbitration agreement, to refer an arbitrable dispute between them, for resolution to a particular institution of national or international character. An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply.[19]

**Statutory Arbitration**

When arbitration is conducted in accordance with the provisions of a specialenactment, which specifically provides for arbitration in respect of disputes arising onmatters covered by that enactment, it is called Statutory Arbitration. StatutoryArbitration is such a proceeding where the parties are referred to the arbitrator interms of the provision made in a particular statute. There are a number of Central andState Acts, which provide for such arbitrations.

**Domestic Arbitration**

The expression "Domestic Arbitration" has not been defined in the Act of 1996, though it finds place in the Part I of the Act.[20]"Domestic Commercial Arbitration" means an arbitration relating to disputes arising out of legal relationships whether contractual or not considered as commercial under the law in force in India and where parties are (a) individuals who are nationals of India; or (b) a body corporate which is incorporated in India; or (c) anybody or department of the Government of India and/or State Government and/or the local bodies including local authorities, State Government and Union Territories; or (d) an association or body of individuals and/or a partnership firm having its place of business in India.

**Foreign Arbitration**

An arbitration that takes place in one state is a foreign arbitration in another

State. It does not matter whether the arbitration is commercial or non-commercial or whether the parties are from the same country, from different countries or that one or all are from same State. Since even a domestic arbitration in one State is a foreign arbitration in another State. In some legal systems the courts will not come to the aid of a "foreign" arbitration by way of aiding in the procurement of evidence, granting interim orders of protection or the like. However, many modern arbitration laws provide that the courts will aid arbitrations taking place in a foreign State.[21]

**Commercial Arbitration**

Arbitration may be used to resolve social and financial conflicts in the society. It is particularly derive strength from commercial contracts having clause for referring the disputes, if any, to a neutral person of merit and reputation. Lord Mustill averred "commercial arbitration must have existed since the dawn of commerce. All traders potentially evolve disputes, and successful trader must have a means of dispute resolution other than force".[22]

**Conclusion**

Virtue of commercial arbitration lies in its structure whereby parties are deemed "as masters of the arbitration". This is created by the choice of parties to the contract. It keeps focus on bringing justice nearer to the traders. Its formation ultimately results in unification of traders community free rivalry venom. The cultural values of socio economic order seek individuals and institutions to work "for ending feuds rather than pending disputes". The notion and process of commercial arbitration "may infuse the spirit of fraternity among disputing traders" and contracting parties. By adopting the way of arbitration a dispute is to be resolved "amicably together rather than as a combat to be won". The traders feel that "neither is victor nor vanquished" and enmity disappears. The resort to arbitral process keeps alive and maintains the faith and trust between the traders. It is a matter of commercial experience of traders that dispute may arise during performance of mercantile transactions and business contracts. But efforts be exerted to keep difference with controllable limits. Absence of reasonable care to avoid mounting conflict may render "profitable transactions into a probable loss". This is why the traders and businessmen have evolved and explored the platform for amicable settlement of disputes that may arise during the carrying on business transactions.

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