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Historical Anatomy of Arbitration and Maritime Law

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With the recent growth of interdependence of nations on each other for trade and commerce, there has been a prolific increase of disputes. The courts in developing countries are already overburdened with cases and it is essential to accept the advantages of arbitration and other alternate means for settling disputes. The journey of maritime arbitration is a long journey from ancient legal history to modern legal history. The evolution was not overnight but a tumultuous application and discarding of old laws with new laws to suit the pace of modernity. Starting from early Mahabharata where Krishna played the role of an arbitrator to the latest international bodies which intervene to make peace through diplomatic dialogue. This paper critically analyses the historical evolution of arbitration and maritime law which culminates to see the concept of maritime arbitration which is regularly used to resolve transnational maritime disputes. The paper discusses the inception of these laws and how traders and law makers codified these laws to bring harmonization both on national and international platforms.

Keywords: *arbitration, maritime, history.*

INTRODUCTION

For any law to develop it is necessary to look into the origin, scope, and history of the legal system of the nation and the culture of the people leading to its development. Similarly, for any maritime lawyer, Judge, or academician to understand the law on arbitration and maritime, one must delve into its history and evolution. This article critically analyses the

historical aspects of dispute resolution prevalent in the early Vedic era in India and globally while deriving instances from mythological texts like Mahabharata.

Trade through sea bears witness of the century old legacy of arbitration and continues even today. Maritime trade, not just in India but, internationally accounts for more than 70 % of any other modes of trade. Inevitably, where there are businesses and economic transactions disputes are bound to arise. Early traders used to resolve their disputes through alternate dispute resolution mechanisms and the use of arbitration is largely rooted in maritime law. The author explores the ancient means of dispute resolution in general in India and focuses on the field of maritime law in the later parts of the article. The article strongly shows the relationship between international commercial arbitration and maritime law which gave birth to maritime arbitration.

DISPUTE SETTLEMENT IN ANCIENT INDIA

Administration of Justice, since the beginning of ancient Indian history, has been statecraft i.e., the state must look after the well-being of its subjects. The king who was the supreme commander of the state was also often considered equivalent to the notion of state. In *A History of Indian Political Ideas*, U. N. Ghoshal distinguishes between two approaches to statecraft in ancient India.¹ The first approach is that of the *Arthashastra* of Kautilya that is concerned with the inductive investigation of the phenomenon of the state and the second is *Dharmasastra* that deals with a scheme of class duties that stems its source from the ancient Vedas.² In each case, both discuss the solemn role of the King as an administrator of the state function and how he resolves disputes with the yardstick of *Niti* and *Dharma*. The word *Niti* in Sanskrit means moral code, behaviour, and social ethics. A detailed analysis of various ancient treaties with the exceptions of *Narada* and *Parasara*, talks about *raja dharma* (the duties of the King towards the state). The below-mentioned list in *Apastamba Dharmasastra* shows the power of the king in the governance of the state and specifically contains a chapter that deals with *raja dharma* including the subject of dispute resolution.

¹ Patrick Olivelle & Donald R Davis, 'The Oxford History of Hinduism: Hindu Law: A New History of Dharmasastra' (OUP 2018) 257

² *Ibid*

The following are the subjects elucidated from *Apastamba Dharmasastra* for better understanding viz: *varnādharma* (2.10.6; 2.10.12–2.11.14), *ksatriyadharmā* (2.10.6), king's duty to enforce *varnā* (2.10.12–2.11.4). *Varna* means caste in Hindu sastras and *Dharma* means to function, duties, or occupation; *Varnadharmā*, therefore, means functions related to caste and *Ksatriyadharmā* is one of the duties of the caste Ksatriyadharmā. Chapter *rājadharmā* (2.25.1–2.29.10) containing duties of the royal court (25.2–25.14) like construction, ritual observances, lodging Vedic scholars such as king's modesty and provision for needy, gambling hall like officials at gatherings, security, administration, taxes (25.15–26. 17), protection from thieves, gifts to *Brahmanas*, protecting *Brahmanā* property, villages/town officials, taxes, law (26.18–29.10) which includes sexual crimes, assault, and theft, rights of owners, king's obligation to punish, property in marriage, adjudication of disputes which includes witnesses, etc.

Such categorisation of various functions of the King can be found in various *dharmasutras* such as *Gautama's*, *Baudhayana*, and *Vasistha*. Even, treatises like *Arthashastra* contained chapters that directly dealt with the administration of Justice by the King. Later treatises, including *Dharmasastras* like *Manu* and *Yajnavalkya*, categorically gave more emphasis on the legal procedure (*Vyavahara*) and were the chief interest in the overall governance. The kings undertook training to adjudicate lawsuits for which Vedic literature provides abundant evidence.

Analysis of the work of historic authors like Mark McClish and Olivelle suggests that the king was the supreme authority that wielded the power to hand down the highest punishment. This indicates two aspects of the function of the King:

1. The king is the *dandadhara* i.e., wielder of the staff.
2. The King can also act as an arbitrator.

There has been indirect evidence that Vedic texts and dharma literature have used amicable ways of settling disputes in the Kingdom. When matters used to be presented before the King, not always did the King award punishment. The King also used to settle the disputes, like who should get what quantity of grains, internal family matters amicably after listening to both the parties, giving him the designation of an arbitrator. The Kings' power to inflict punishment or

danda shows his ability to dominate the state courts and the supremacy given to the King by the dharma literature. The primary question that requires emphasis here is whether the King was only considered to be the supreme Judge or could he also act indirectly as an arbitrator? *Naradasmriti*, in this respect, states that ‘*The guru is the punisher of the self-possessed; the King is the punisher of the wicked...*’

It is pertinent to mention here that both king and the guru can be termed as the punisher but it inevitably cannot be inferred that such punishment has to be given in the state court. “This verse does not use the technical term *danda*, and the guru’s punishment likely refers to *prayaschitta*; the word *prayaschitta* means atonement for sins committed by individuals, which forms an independent and restricted category within the greater legal world of *Dharmasastra*.”

³ This form of punishment can also mean that the guru or the King can form informal courts to decide minor offences or disputes. The king who is the ultimate Judge routinely used to delegate his power to subordinate appointed judges. The *Dharmasutras* (an ancient manual on law) also mention the delegation of power by the king to the *sabha* (the King’s council) and Samiti that were administered by the ministers and legal experts. The most important amongst them were called *Pradoavika* or the Chief Justice. A study of Hindu Polity divulges that the *sabha* administered the law. These were the popular village assemblies that tried to arbitrate rather than the king when it was feasible to do so. ⁴ The dharma jurists here, also mention the presence of a variety of non-state legal forums such as ‘Family, guilds, assemblies, appointed judges and the king.’⁵

The dharma text mentions that these were the hierarchy of courts starting from the lowest i.e., *Kula* and each were superior to the other having the power to review the decisions of the lower courts. The fact that these assemblies were termed as the court was only to segregate the jurisdiction with the help of semantics. The *Arthasastra* of Kautilya, the earliest source on statecraft, addresses its rules on *Vyavahara* entirely to the appointed judges called *Dharmasthas*

³ Olivelle (n 1) 274

⁴ A S Altekar, *State and the Government in Ancient India* (Motilal Banarsidass 1958) 245

⁵ Kulani srenayasaiva hanas cadhikrto nrpah I pratistha vyavaharam gurvebhyas tuttarottaram II (NSm Ma 1.7), Olivelle (n 1) 274

rather than to the king (3.1.1ff).⁶ These were the judges appointed by the king to solve different kinds of offences and disputes in society. In addition, these different forms of the court were designated with limited power to inflict punishment. Brhaspati (1.1.91) states that these judges could carry out only two forms of punishment, verbal reprimands, and public censure. The power to inflict pecuniary and corporal punishment including the death penalty was severely restricted only to the King.

It implies that, if need be, in non-serious offences, if a matter reaches the king, he can call for the perpetrators and the victim and solve the dispute amicably giving the King the semantic of an arbitrator. This shows that the birth of arbitration has always been there, from the ancient Vedic times which have been given legal structure gradually by want of faster relief in the form of legislation⁷ and conventions.

*'Families, guilds, assemblies, and the like that have been duly approved by the king may try cases among men, with the exception of sahasa.'*⁸ *Sahas*a includes those acts which are extremely violent in nature and needs the verdict of the King who will decide the punishment. This shows that the king had authorised the use of settling disputes among men which can be stated to be a form of arbitration courts. *Devannabhata* takes up the issue also in the *Smiticandrika* (III: 45), seeming to equate these lower courts with the permanent (*pratistha*) and impermanent (*apratistha*) courts mentioned in BrSm 1.1.57 as opposed to the courts overseen personally by the king (*sahas*a) or by the appointed judge who possesses the King's signet (*mudrita*). He argues that judges in *pratistha* and *apratistha* courts could not adjudicate cases pertaining to *sahas*a and neither could they assign punishment or fines. Kane argues that they were essential "arbitration courts".⁹ Similarly, power to solve disputes within one's own household was also given to the head of the house i.e., the *Karta*¹⁰. The *Karta* has the authority to solve household

⁶ *Ibid* 277

⁷ India has recently amended the Arbitration and Conciliation Act, 1996 and there are various conventions on International Commercial Arbitration such as the Geneva convention, New York Convention etc

⁸ Rajna Ye Viditah Samyak Kulasreniganadayah I sahasanyayavarjyani kuryuh karyani te nram II (BrSm 1.1.92)

⁹ P V Kane, *History of Dharmasastra* (3 vol, Bhandarkar Oriental Research Institute 1973) 280

¹⁰ Similarly the ordinary *grin* also would be an 'authorized person' (i.e., appointed judge) so far as his own household-affairs are concerned- this is being in accordance with the declaration that the householder is master in his own house which means that he is free to do with all disputes within his own household up to the infliction of

affairs up to the infliction of punishment in order to discipline his wife, son, slave, pupil, etc. He need not report to the king any issue which is solvable by him and which does not require the infliction of corporal punishment. Here, the household can be analogised to that of the arbitrator or the Chairman in an arbitral tribunal.

Ancient India had bestowed upon these appointed judges a procedure of law to be followed in every trial or dispute. They were called *Vyavahara*. But the important aspect is that these legal procedures were followed by defined courts in litigation but there is little that is mentioned about its use in informal courts such as caste and guilds. This implies the presence of informal courts where the process of arbitration and mediation were used to solve cases. In general, there were four kinds of courts viz: Movable courts, stationary courts, courts deriving authority from the king, and courts presided by the king himself. The striking feature of the ancient judicial system was the presence of the popular courts or the lower-level courts such as *kula*, *sreni*, and *puga*. The *kula* consisted of people of a near or distant relative and if there was a quarrel between two members then the elders tried settling the dispute. This was the informal body of elders arbitrating the disputes amongst them. On a similar note, when the family arbitration failed, the matter was submitted to the *sreni* courts. The term *sreni* was used to denote the courts of guilds which became a prominent feature of commercial life in ancient India from 500 BC.¹¹

The members of *sreni* courts consist of four to five members who were from a particular profession like betel sellers, weavers, shoemakers, etc. 'Though these courts were essentially non-official and popular, they had the royal authority behind them. The government refused to entrain any suits except in appeals against their decision. It also gave effect to their decrees.'¹² *Brighu* mentions that amongst tribal people, there existed a peculiar judicial system. The people residing in forest areas settled their disputes with the help of foresters, members of caravans, the soldiers by the tribunal of soldiers and those who stayed in the village settled

punishment-especially with a view to proper discipline among his children in pupils; but he may deal with all cases, except leafleting of body punishment, on the doing of acts conducive to the depravity (Tr. Jha 1920-39)

¹¹ V Sathiya, 'Judicial Administration during Ancient Period in India' (2016) 7(2) International Journal of Research in Humanities and Social Studies 72

¹² *Ibid*

their disputes by villagers or foresters by mutual agreement and that five tribunals for foresters and other were *Kulikas, Sarthas, Headmen, Villagers, and citizens*.¹³ Although the author (Ollivelle) vehemently discuss that there was proper justice system in which trials, witness and evidence were taken to prove the guilt but it cannot be denied as the writer himself says, these courts acted as an impartial adjudicator or arbiter. At the same time, it can be accepted with affirmation that the king had a dual role; he was the supreme judge and also the one who in due cases would act as an arbitrator for there is an interpretation of various dharma jurists who have equated these family courts to that of arbitration tribunals.

Brhaspati is the first ancient jurist who has spoken about the arbitrable nature of these courts; questioning whether these judgments were actually ever enforced or complied with. Since the fines and the court costs involved were hefty, parties mostly preferred court settlement. As *Manu* writes that the overall authority to decide the matter was of the king, it is highly possible that these courts acted more as a tribunal than as a court.¹⁴

Brhaspati uses the technical term *samdhi* for this agreement between litigants and recommends the imposition of double the amount under dispute as a fine on both. *Brshaspati* (BrSm 1.3.45), however, leaves open the possibility that, in a difficult case, where evidence is strong for both sides, the judge himself may encourage the parties to arrive at a mutually agreed settlement.¹⁵

In modern times, the process of settling a dispute by arbitration also follows a similar procedure of filing a claim, acceptance of the claim, evidence collection, hearing, and rendering of the award. There is a major resemblance that can be noted to the ancient

¹³ S D Sharma, *Administration of Justice in Ancient India* (Harman Publishing House 1988) 169

¹⁴ *Manu* however, introduces several noteworthy innovations. First, the judicial authority of the state is vested in the king; there is no separate judiciary like the one envisioned by Kautilya. When the king is unable to perform his judicial functions, however, he may delegate it to another person(s), who then function as substitute judges in place of the king; but their authority is derivative. The person whom the king appoints to try cases in his place is not given a special or technical name. *Manu* simply calls him “a leading minister” or “a learned Brahman” (MDh 7.141, 8.9). The term *prādvivāka* that *Manu*, as *Gautama* before him, uses in the context of examining witnesses, most likely refers to a court official designated to interrogate witnesses rather than to the officiating judge, even though in medieval legal literature this term is used with reference to the chief judge

¹⁵ Olivelle (n 1) 296-297

vyavahara. The focus of *Dharmasastra* is on private litigation with the court acting as an impartial referee.¹⁶

ARBITRATION IN MAHABHARATA (ADR MECHANISM)

In Indian epics like Mahabharata, various methods of amicable settlement were used to initially stop the inevitable war between the *Kauravas* and *Pandavas*. The most notable method was the conciliation or mediation used by Krishna to convince Duryodhana not to go for war but rather accept peace. It is because of this reason that Krishan is called as the arbiter of Dharma who in spite of convincing Duryodhana, when he could not mediate peace, Krishna awarded that War is mandatory. In essence one can see that Krishan tried to arbitrate between the Kaurava and the Pandavas and when He failed, He ordered Arjuna to go to war.

The story of Mahabharata is stated to run that there were two sons of King *Vichitravirya*, *Dhritarashtra* and Pandu. *Dhritarashtra*, who was born blind, had a hundred sons known as *Kauravas*, and Pandu being the younger son had five sons known as *Pandavas*. Although *Dhritrarastra* was elder yet Pandu became the King of Hastinapur because a blind cannot become a king. Pandu died early and inevitably *Dhritrarastra* became the king. Arguably, Pandu's son was supposed to be the heir apparent but since he was not of age, *Dhritrarastra* kept ruling the kingdom until Yudhishtira became the king after maturing. This made *Dhritrarastra's* son Duryodhana jealous and he wanted to see the *Pandavas* dead.

In consequence, Duryodhana made various plans to execute the *Pandavas* to become the next heir to the throne. For example- he devised a plan where he lured the *Pandavas* to the city of *Varanavata* where he built a wax palace that appeared to be comfortable but in reality, was combustible in nature. His plan was to have the place burnt to the ground while the *Pandavas* was asleep in the wax palace.¹⁷ However, the *Pandavas* escaped this treacherous plan of Duryodhana and dressed incognito as Brahmin priests, and went to the city of *Ekachakra*. It was during the swayamver of Princess Draupadi that the *Pandavas* finally revealed themselves. The condition for Draupadi's swayamver was that there is a target and there are arrows and

¹⁶ *Ibid* 297

¹⁷ Alok Sikhand, 'Adr Dharma: Seeking a Hindu Perspective on Dispute Resolution from the Holy Scriptures of Mahabharat and Bhavatgita' (2007) 7(2) Pepp Disp Resol LJ

anyone who sends five arrows in succession in the whole of the wheel unerringly hitting the target, would win Draupadi. None of the kings except one Brahmin could hit the target with ease. The swayamver being the shatraya practice and doubted the Brahmin man, *Dristadyumna* secretly followed him and decipher him to be Arjuna.

The knowledge of the *Pandavas* being alive and marrying Draupadi infuriated Duryodhana and *Dhritarashtra*. To which, Duryodhana again started to make strategies to defeat the *Pandavas*. Duryodhana was advised by his own kinsmen and elderly counsellors not to make any strategies to kill the *Pandavas*, rather divide the kingdom and give a half share to the *Pandavas*. Despite the reluctance of Duryodhana, his father *Dhritarashtra* divided the kingdom and gave an abandoned village to the *Pandavas*. The desperation of the Duryodhana to defeat, seeing the prosperity of *Pandavas*, kept growing day by day. He was then advised by his Uncle *Shakuni* to play the great game of dice to take over the kingdom of the *Pandavas*. *Yudhishter* being fond of gambling readily accepted and, in the end, lost the kingdom, and the *Pandavas* were sent in exile for fourteen years.

After the exile of the *Pandavas* was over, they got their freedom back but they were still left without the kingdom. Thus, Lord Krishna advised the *Pandavas* to seek a peaceful settlement.¹⁸ When the *Pandavas* unvoiced to the *Kauravas* failed to communicate their interest in having peace, Krishna decided to take it upon himself to settle the dispute between the two families. Upon discussion within the *Pandavas* family, they decided to send Krishna as an arbitrator/mediator to amicably settle the dispute with peace.

In the journey to arbitrate/mediate for peace, Lord Krishna was counselled by the *Pandava* family; *Bhim* told *Krishna* to use kind words with *Duryodhana*, *Nakul* advised *Krishna* to speak with mildness and if *Duryodhana* did not agree, to threaten him, to instill fear in him. Similarly, *Sahadev* and *Draupadi* advised that if the mediation fails, then to declare war at any cost. In the epic of *Mahabharata*, we can compare the legal concepts of mediation and arbitration or in other words, alternate dispute resolution to the present story. Lord *Krishna* initially tried to mediate peace but when he failed to negotiate, he gave his final award of a war between

¹⁸ *Ibid*

Pandavas and *Kauravas*. Here, he can be compared as a sole arbitrator who was sent by the *Pandavas* who was accepted as a sole arbitrator by the *Kauravas* to settle the dispute. In arbitration proceedings, a similar concept is being followed where one party nominates a sole arbitrator and sends a name to the opposite party who can either accept or reject the nomination and thereby, starts the process of arbitration. In the majority of the maritime contracts or trade-related contracts, it can be noticed that initially, the party chooses to mediate or negotiate, failing which, they proceed to arbitration to resolve disputes. We can also compare the roles of *Bhim*, *Nakula*, *Sahdev*, and *Draupadi* to the roles of a lawyer played in the arbitration proceedings.

HISTORY OF MARITIME LAW

Maritime law is defined as law that refers to sea-born trade and naval affairs. Some authors have defined it as a legal framework for maritime transport.¹⁹ Others have defined maritime law as that which comprises of '*body of legal rules and concepts consisting of business of carrying goods and passengers by water*'.²⁰ To expand maritime law, it can be divided into two subsets: one which can be termed as private maritime law that deals with charter party contracts, contract of affreightment, and salvage, and the other which can be termed as public maritime law which deals with oceans and the use of its resources, in other words, the law of the sea. While the semantical debates of what is maritime law, shipping law, admiralty law is none but one, the idea of maritime history is equivalent to the coastal history of different nations. This is the simple reason why it is often said that the history of maritime law is lost in antiquity.²¹ It was the customs and practices of the sea fearers which lead to the evolution of maritime law. These, along with the decisions given by the sea merchants, were codified into *Ratio Scripta* in various parts of the world which later went on to become positive enactments.

¹⁹ *Guidelines for Maritime Legislation* (1 vol, 3rd edn, United Publication Economic and Social Commission for Asia and The Pacific) 1

²⁰ Thomas J Schoenbaum and A N Yiannopoulos, *Admiralty and Maritime Law Cases and Material* (Charlottesville 1984) 1

²¹ P Mukherjee, 'Maritime Law and Admiralty Jurisdiction: Historical Evolution and Emerging Trends' in *The Admiral* (Vol VI, Ghana Shippers' Council) 1-42

The earliest legislation on maritime law date back to the period between 2000 B.C. -1600 B.C. It was called the Code of Hammurabi of Babylon which dealt with the matters relating to Marine collisions, the practices of bottomry, and leases of a ship.²² The rules mentioned in the code of Hammurabi were a mere collection of Sumerian collections of customs and practices of earlier times. The first inventors of marine and originators of maritime commerce were the Phoenicians of the Mediterranean coast. 'Their voyages were extended step by step from Sicily to Sardinia, Greece, Gaul, and Spain; then boldly venturing beyond the Mediterranean and out upon the waters of Atlantic their courage was rewarded by the discovery of Great Britain.'²³ 'Following Phoenicia the other great historic powers which claimed the empire of the sea were Rhodes, Persia, Greece, Macedonia, Carthage, and Rome. And then, in their order, Pisa, Venice, and Genoa. Pisa, on the suppression of the Roman Empire, had erected itself into a republic and soon became a formidable maritime power and maintained numerous fleets, Pisa, with her powerful navy long enjoyed the distinction of being the mistress of the sea.'²⁴

Greece also holds a prominent position in the maritime world as Greek law contains many maritime provisions such as treatment of shipwrecked '*Nautodikai*' which means seamen, issues dealing with maritime contracts, and other procedural matters dealing with the jurisdiction of maritime courts; these courts were called the *Dikai Emiporikai*. Other maritime issues that the courts dealt with were practices of bottomry, respondentia, and contracts of *Foneos Nauticum* or marine usury that is loans to cover maritime risks, which were the forerunner of marine insurance contracts.²⁵ Most importantly the credit for the oldest and first authoritative code on maritime law goes to the Island of Rhodes which became a prominent place for trade and commerce by the end of the Greek era. Much of the Greek maritime law including the Athenian laws were based on these codes.²⁶ Soon thereafter we find that the maritime code of Rhodes was subsequently adopted by the Romans that, by then, had become powerful upon the sea. Issues such as general average and law of jettison were found under

²² Edgar Gold, *Maritime Transport: The Evolution of Maritime Policy and Shipping Law* (Lexington Book 1981) 5

²³ Jorge S Potter, 'The Sources Growth and Development of Law Maritime' (1902) 11(3) *The Yale Law Journal* 143

²⁴ *Ibid*

²⁵ James Reddie, *Historical View of The Law of Maritime Commerce* (William Blackwood & Sons) 54

²⁶ Gold (n 23) 8

the heading of *De Lege Rhodia De Jactu*. These laws were recognised for three thousand years by almost all commercial nations.

The Roman maritime law which was later codified by Emperor Augustus contained a number of subject matters ranging from the kind of trading vessels to the acquisitions of vessels by constructions. In addition, matters such as conveyance or transfer of vessels by sale or bequest, rules of co-ownership and partnership, joint and several liability to third parties, joint vicarious liability by the master and crew, maritime lien, and contract of affreightment were also dealt with in the Roman law. However, there was no special provision on collisions and the Roman statute of damages, the *Lex Aquilia* was the governing law under the liability was imposed on the negligent navigator.²⁷ Another piece of important legislation around the 15th century is the *Consolato Del Mare* of Barcelona which has been debatably argued that it was the Pisans who created this elaborated code of maritime law. To justify this, issues such as owners of the ship, rights, and duties of masters and seamen, the law of affreightment, of equipment and supply, jettison, salvage, average ransom, and prizes, the *Consolato* was usually referred to.

Another important legislation that followed the *Consolato* was called the rolls of Oleron (*Roles d' Oleron*). This was published on the island of Oleron near Rochelle off the coast of France. There are two translations of the rolls of Oleron spread across Western Europe in the 14th Century namely *Vonnesse Van Damme* (Judgement of Damme) and the other named as *Of Lawis of Scyppis* (Of Laws of Ships).²⁸ The earliest part of Rolls of Oleron is *Hogheste Water-Recht de Wisby* which is said to be the oldest maritime law of the middle ages. An Ordinance on private maritime law was adopted in the 12th Century by the Congress of the Hanseatic League and the league developed the law into a legal doctrine in the early 17th Century.

'These laws were published about the year 1150, and relate to the navigation and sale of a ship, the duties of the master and mariners, wreck, freight, salvage, jettison, injuries to

²⁷ Mukherjee (n 21) 5

²⁸ Edda Frankot, *Medieval Maritime Law from Oleron to Wisby: Jurisdictions in the Law of the Sea* (University of Aberdeen) 159

cargo, quarrels on board ship, collisions, supplies, stranding, etc., but do not mention the important subject of marine insurance.’²⁹

In Northern Europe, the most famous maritime code was the Laws of Wisby. It was an important city upon the islands of Gotland in the Baltic Sea, which is now a part of Sweden. Before venturing into maritime law in England, it is worthwhile to state the next remarkable publication of maritime law in the ancient city of Marseilles which contained chapters of navigation and maritime contracts. It was these confederations of Hanseatic city which included 62 European cities in the 13th century which generated many rules and regulations on maritime and created the marine ordinance at Lubeck in 1691. Next in time was the maritime compilation known as ‘*Le Guidon*’ which originated in France in the year 1400 dealing mainly with bottomry and insurance. Apart from the above, during the reign of *Louis XIV*, legislation on maritime, called the marine ordinance of *Louis XIV* was enacted and as a matter of fact, judges like Lord Mansfield and prominent academicians have credited this masterpiece legislation for having garnered maritime knowledge.

The ubiquitous nature of English maritime law is divided into common law and statutory maritime law. *Lex mercatoria* and *Lex Maritima* are part of the common law and the basic source of English maritime law is said to be the Black Book of Admiralty.³⁰ Along with the chancery courts and the common law courts, the court of the Seaports famously the cinque ports exclusively dealt with maritime matters. The monarchs gave certain privileges to these ports which were situated near the English channels and had wide jurisdiction to resolve maritime matters. These courts which sat near the ports were presided over by the merchants and local port officials and they adopted the law of the Rolls of Oleron along with local customary law.³¹

‘Hence, the great body of maritime law in England consisting of the *lex mercatoria* and the *lex maritima*, developed organically, independent of code or statute. It was derived, basically, from three sources; namely, foreign laws, mainly the Rolls of Oleron and the

²⁹ Jorge S Potter, ‘The Sources Growth and Development of Law Maritime’ (1902) 11(3) The Yale Law Journal 143

³⁰ Gold (n 23) 422

³¹ Edgar Gold, *Canadian Admiralty Law: Introductory Materials* (7th edn, Dalhousie University, Faculty of law, Halifax 1990) i-2

Hanseatic Ordinances, treatises of learned authors, and judicial decisions of England and other jurisdictions which followed the law merchant and the law maritime.’³²

HISTORY OF MARITIME IN INDIA

From the time the Portuguese arrived in India to the time the European colonial empire that established in the area, maritime in India played a pivotal role in holding the oceans together.³³ It was during the Mughal period that shipping played an important role. People use to go for pilgrimages for the Hajj from the east to the west, transshipping at Indian ports. There was vast export of Indian textiles and spices across the Indian Ocean through ships. There is evidence of shipbuilding during ancient times as far as the 16th century. Ships were made out of timber and were held together by coir twine. There was also a reference to iron nails being used in the construction of ships. Evidences that masters and captains used oral knowledge and other aids for navigation, compass, and charts for sailing have been found. The State of Gujarat in India had a great deal of trade to the Red Sea. There are accounts of several large State-owned ships making the passage from Surat to Jiddah with thousands of pilgrims and goods for trade on board as early as the 16th - 17th Century. From the 16th century onwards and for about 200 years thereafter it was the large Indian ships from the Coromandel Coast which were the principal carriers of goods for trade from southern China into the Indian Ocean.³⁴

During the 17th century, India saw an overall growth of trade and commerce and general prosperity of principal ports like Surat, Masulipatnam, and Hoogly. Merchants of Surat alone built a humongous amount of iron fleet and the ‘fleet of Hindustan’ was deployed mainly in the western Indian Ocean for trade purposes. Similarly, in the eastern Indian Ocean, the merchants of the Coromandel Coast kept a strong connection with the western world. There are evidences of Indian ships going to Acheh, Bantam, Macassar, and Thai ports of Mergui & Patani. History bears witness that a famous fair in Cuttack in Odisha called *Bali Yatra* which means ‘the journey to Bali’ is conducted every year to celebrate the ancient linkage between

³² Mukherjee (n 21) 7

³³ Ashin Das Gupta & M N Pearson, *India and the Indian Ocean* (OUP 1987)

³⁴ *Ibid* 27

India and Indonesia. During the 2nd century, BC Indian mariners having garnered knowledge of the monsoon winds and Indian Ocean currents use to travel through the southern routes across the Indian Ocean and to the island of Indonesia.³⁵

The merchants from Odisha use to start from Lake Chilika during the month of November and sail down to the coast of Sri Lanka and after trading in Sri Lanka, they used to reach the tip of Sumatra. The merchants having finished the trades in Sumatra, Bali, and Java would then return to Odisha by mid-march. These instances show widespread use of ships and deep maritime history engraved in Indian history. In ancient India, any disputes relating to trade and commerce by ships were ultimately settled by the rulers of the land. The journey from ancient to modern India has seen various changes in the laws dealing with maritime. The earlier British colonial legislation and Acts now stand repealed due to the recent enactments of the Admiralty (Jurisdiction and Settlement of Maritime Claim) Act 2017.

HISTORY OF INTERNATIONAL COMMERCIAL ARBITRATION

The history of arbitration dates back even before any formal system of courts was developed. Much like the concept of dispute settlement by the head of the families, as already mentioned in the *Dharmashastras* and *Vedas* in India, internationally also ancient arbitration followed a similar trend where parties used to submit the disputes to the chief or a friend rather than resorting to any public machinery.³⁶ The formal development of a legal or a judicial system that had its basis on codes, doctrines, statues, etc., the historical evolution of arbitration is rather informal where its foundation was the will of the parties, less procedural formalities, and speedy resolution of conflict.

The journey of international arbitration can be sketched back to the ancient Greeks and the Romans.³⁷ One of the earliest cases in Greek history is in the 650 B.C. when Andros and Chalcis referred their dispute of the possession of the city of Acanthus to the decision of

³⁵ Swarajya Staff, 'A Short History of Bali Yatra Festival', (*Swarajya*, 3 November 2016)

<<https://swarajyamag.com/culture/a-short-history-of-bali-yatra-festival>> accessed on 03 May 2021

³⁶ Earl S Wolaver, 'The Historical Background of Commercial Arbitration' (1934) 83(2) University of Pennsylvania Law Review 132

³⁷ Emerson Frank D, 'History of Arbitration Practice and Law' (1970) 19 Cleveland State Law Review 155

Parians, the Samians, and the Erythraeans.³⁸ According to various scholars and authors, there were no notable developments in inter-state arbitration during the Roman period. However, there are contrary evidences that suggest that there were cases reported to arbitration in Rome following the takeover of the policy of the Hellenistic princes of employing arbitration to adjudicate differences between states.³⁹ Overall, the number of cases that were dealt with by arbitration in ancient Europe, even with a certain specific case, was minimal but it paved a way for the growth of arbitration in the middle ages.

In the Middle Ages, around the 12th century onwards, war-like situations persisted throughout Europe giving rise to frequent conflicts relating to land holdings, commanders holding power, etc. Unlike the previous centuries, solving such conflicts took place through treaties while cities entered into alliances with each other. These treaties contained a '*clause compromissoire*' enabling future disputes to be submitted to arbitration, especially the German treaties. At the same time, one cannot overlook the role played by the Church where people considered the Pope as an emissary of God who acted as an arbitrator in several cases. Simultaneously, the Baltic provinces used arbitration between independent states and also individuals; however, it has often been contradicted to have been mediation rather than arbitration. The growth of arbitration reached its zenith in the Italian states where regular tribunals used to decide upon matters.⁴⁰

The upward graph for arbitration was further observed during the fourteenth century. In the year 1306 the Royal Advocate of Normandy, Pierre Dubois, drew an elaborate plan of settling disputes of the holy land through arbitration. He advocated that all 'quarrels' in Europe must be resolved in the court of law consisting of three 'ecclesiastical judges' and six others equally representing both parties.⁴¹ "Subsequently, in the centuries that followed, other European scholars and theorists came up with a concrete plan for international arbitration in their

³⁸ Anton Reader, *L'Arbitrage International Chez Les Hellenes* (Making of Modern Law 2013) 14

³⁹ Henry S Fraser, 'A Sketch of the History of International Arbitration' (1926) 11 Cornell L Rev 179, 187

⁴⁰ *Ibid*

⁴¹ *Ibid*

books⁴² where they advocated for giving up arms for world peace.^{43'' 44} As the quest for peace was encouraged throughout Europe, trade and commerce gradually started taking lead.

From the medieval age, trade and commerce had a rapid expansion and the role of international commercial arbitration came into the limelight. As traders travelled from one country to another, they took along with them their trade law, also known as *lex mercatoria*. This law was the usual trade customs and practices and was neither statutory law nor could it be enforced by statutory courts. This law applied to all the commercial transactions and disputes by the consular courts through the itinerant consuls accompanying the merchants in different countries. These consul courts were free from any domestic jurisdictions and so were the merchants. However, England did not entertain foreign consuls to settle disputes in their own land as they had their own summary Fair courts, also known as Pie Powder courts. England enforced the compulsory jurisdictions of these courts in merchant disputes as the state generated huge revenue from such Fair courts. These courts followed the merchant law ensuring less technical procedures and speedy justice by granting daily hearings to the merchant as it believed that 'the foreign merchant was a person to be treated tenderly for with him the king could deal directly'. Authors such as I Cohen and I Birdseye considered these courts as courts of arbitration. However, as rightly pointed out by Earl Wolaver, this court procedure in England can be viewed from two dimensions – one, if we assume the definition of arbitration simply as a speedy resolution of disputes without following any formal procedure and applying the customary law to the disputes then such courts can be termed as arbitration tribunals. On the other hand, if arbitration is to mean that the parties can mutually consent to submit their dispute for settlement to an independent party (the arbitrator) rather than courts, where the choice of dispute settlement is not an imposed jurisdiction by the state

⁴² Emeric Cruce, *Le Nouveau Cynee* (1623). Sully in his book *Oeconomics Royales* also advocated for international peace, to pacify quarrels of civil, political and religious affairs in Europe both domestic and foreign. The father of International Law Hugo Grotius in his famous book *De Jure Belli et Pacis* vehemently voiced the reasonableness of settling disputes through international arbitration

⁴³ Fraser (n 39)

⁴⁴ *Ibid*

and the award is sovereign in itself; then by such definition, the fair courts in England cannot be referred to as arbitration.⁴⁵

With the decline of the fairs in England and Europe there was a simultaneous decline of the merchant courts and the courts of Pie Powder. At the same time, there was a rise in the formal court system across the continent of Europe. Due to the heavy technical procedures and the delays in the formal court structures, merchants started using private arbitration as a means to resolve disputes. In his book *De Arbitris*, Hugo Grotius refers to two kinds of arbitrators – one who is independent and decides on the basis of law and equity which in true sense is equivalent to the modern-day definition of the arbitrator, and the other who is also an independent being but decides disputes on the basis of statutory laws, this can be more like an ordinary court system. Similarly, in other parts of continental Europe, such as France, Germany, etc. commercial disputes used to sort by referring them to indifferent merchants who acted as arbitrators in the absence of commercial courts.⁴⁶ For example, ‘[a] letter that was sent to Lord Mayor of London to appoint to English Merchants and two other merchants being strangers to hear a dispute between a Spaniard, the captain of a Spanish ship and a trader from Florence in regard to freight of the ship’.⁴⁷

Stepping into the modern era the foundation of international arbitration was seen in the Jay Treaty of 1794 between Great Britain and the United States enabling strong usage of arbitration in ‘international diplomacy’.⁴⁸ Soon thereafter in the following centuries, with the growth of the industrial revolution, there was an increase in international trade and commerce which facilitated more treaties, contracts, and the presence of arbitration clauses in such contracts and treaties on a regular basis. Here, emphasis must be given to the fact that the treaty of Guadalupe Hidalgo, 1848, which was responsible for ending the Mexican War, also featured a permanent arbitration clause.⁴⁹ Meanwhile, in England, the development of commercial

⁴⁵ Wolaver (n 36)

⁴⁶ Gerard Malynes, *The Ancient Law Merchant* (1685); Lynden Macassey, ‘International Commercial Arbitration – Its Origin, Development, Importance’ (1938) 24(7) American Bar Association Journal 518

⁴⁷ ‘Acts of the Privy Council’ (1549) 2 Dasent 1547; Lynden Macassey, ‘International Commercial Arbitration – Its Origin, Development, Importance’ (1938) 24(7) American Bar Association Journal 518

⁴⁸ J D Newcomb, ‘New Light on Jay’s Treaty’ (1934) 28(4) American Journal of International Law 686

⁴⁹ Fraser (n 39)

arbitration underwent several difficulties before it was given legal recognition through the enactment of the Arbitration Act of 1889 making revocation of the arbitration agreement in contracts, impossible. In the United States, in 1920 the New York State Bar Association and New York Chamber of Commerce played a crucial role in the enactment of the New York State Arbitration Act 1920 which made reference to both existing and future dispute between parties to arbitration thereby giving an impetus to the advancement of international arbitration in American history.⁵⁰ Earlier to this, the United States Code of Civil Procedure⁵¹ used to deal with arbitration matters and the established Doctrine in *Vynior's* case meant that only existing disputes can be submitted to arbitration and parties can revoke the arbitration agreement before they submitted the case to arbitration which rather acted as a deterrent in the development of arbitration law in the US⁵².

The present-day growth of international arbitration can be attributed to various treaties amongst nations for the application and enforcement of arbitral awards such as The Franco-Belgium Convention of 8th July 1899, Convention between Czechoslovakia and Yugoslavia of 17th March 1923, the Geneva Protocol of 20th September 1923, and the Geneva Convention of 26th September 1927. At the same time, different national Chambers of Commerce of respective countries started developing institutional and procedural rules for the proper conduct of international arbitration. One of the most notable amongst them is the International Chamber of Commerce in Paris which made its own arbitration rules and established the Court of Arbitration in Paris.

To overcome the lacunas of 'enforcement of foreign awards' of the Geneva Convention of 1927, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 was framed and widely accepted. Soon thereafter, in the year 1961, for the very first time, the words 'international commercial arbitration' was instituted in the European Convention on International Commercial Arbitration. Parallel to institutionalized arbitration, *ad hoc* arbitrations were prevalent as a practice and dispute resolution mechanism across the

⁵⁰ Lynden Macassey, 'International Commercial Arbitration - Its Origin, Development, Importance' (1938) 24(7) American Bar Association Journal 518

⁵¹ Code of Civil Procedure, s 23, 65

⁵² H H Nordlinger, 'Law and Practice of Arbitration in New York' (1948) 13 MO L REV

globe, however, with no uniform rule for the procedure. Multiple attempts were made through an international or continental set of rules for such unification with only little success. One of the prominent set of rules in this field was that of the United Nations Economic Commission for Europe (UNECE) of 1966. But, it proved inefficient for *ad hoc* arbitration between common law and civil law countries.⁵³

The uniformity of arbitration rules was finally achieved success with the adoption of the UNCITRAL Arbitration Rules by the United Nations Commission on International Trade Law in April 1976. Because of its wide international acceptance, these rules were also accepted by International Institutions resorting to arbitration. Finally, in the year 1985, the UNCITRAL model law came into existence which was adopted by almost every developing and developed countries because of its striking features of conducting the arbitration process, both *ad hoc* and institutional, giving a scope to the parties to incorporate the model law in their domestic legislation along with other features like the supremacy of party autonomy, the extent to which courts can interfere in arbitration matters both domestic and international and the enforcement of foreign arbitral awards.⁵⁴

HISTORY OF ARBITRATION IN INDIA

The debate centred around the fact that India's attempt to make its jurisdiction an attractive destination for International Commercial Arbitration has become an intrinsic part of the legal discussions and deliberations amongst the stakeholders. However, this attempt has its earliest origin in the New Industrial Policy of 1991, where India from a closed economy turned into a liberalised, privatised, and globalised economic system.⁵⁵

The Indian Government for a long time since 1947 maintained a policy that was completely averted to the participation of foreign agents. However, realising the increasing debt burden and declining innovations in heavy industrial machines and capital, the government started reconsidering its attitude. With the notification of the New Industrial Policy of 1991 this

⁵³ United Nation Conference on Trade and Development, *Dispute Settlement, International Commercial Arbitration* (2005) <https://unctad.org/en/Docs/edmmisc232add38_en.pdf> accessed 3 May 2021

⁵⁴ *Ibid*

⁵⁵ 'Statement on Industrial Policy' (Government of India, Ministry of Industry 1991) <https://dipp.gov.in/sites/default/files/IndustrialPolicyStatement_1991_15July2019.pdf> accessed 3 May 2021

restrictive approach finally witnessed a meteoric shift when the objective of building a self-sufficient and socialistic economy, changed to creating an economic system that favoured foreign investment and advancement in technology.⁵⁶

The opening up of the economy brought with it the obvious outcome, i.e., increasing number of international commercial transactions which inevitably led to rising of international commercial disputes. However, the Indian laws that governed the resolution of these international disputes (which are usually sort to be resolved through arbitration) effective during that period were found to lack the requisite prowess and efficiency in dealing with the international commercial arbitrations.⁵⁷ Therefore, the Government of India in the year 1996 enacted the new Arbitration and Conciliation Act of 1996 (**'the 1996 Act'**), with an aim of reducing court interventions, increasing party autonomy, and disseminating efficiency throughout the processes involved in an arbitration proceeding.⁵⁸

Before the 1996 Act came into force arbitration in India was governed by the Arbitration Act 1940 ('the 1940 Act') and the 1961 Foreign Awards Act ('the 1961 Act'). While the 1940 Act was responsible to govern domestic arbitration proceedings; the 1961 Act was enacted to govern the awards granted by a tribunal seated outside the Indian jurisdiction.⁵⁹ However, these enactments were found to be completely averse to the expanding internationalisation of the Indian economy and were far from matching the robustness of a globalised environment. The reason for the same was that the acts resulted in a system of relief that was slow and unsatisfactory.⁶⁰ The Indian courts hardly ever accepted and enforced the awards of both domestic and foreign arbitral tribunals. The acts were not armed with provisions that restricted unnecessary court intervention which more than often resulted in severe scrutiny of the awards by the courts that led to excessive delays for the award creditor.⁶¹

⁵⁶ Rhonda Bershok, 'Releasing the Tiger? India Moves into the Global Market' (1992) 4 Int'l Legal Persp 53

⁵⁷ 'India Considering Revised Arbitration Law' (1995) 6 World Arb & Mediation Rep 51

⁵⁸ 'Indian Adopts New Arbitration Law' [1996] Int'l Arb Rep

⁵⁹ V S Deshpande, 'International Commercial Arbitration and Domestic Courts in India' (1985) 2 Int'l Arb 45

⁶⁰ 'India Considering Revised Arbitration Law' (1995) 6 World Arb & Mediation Rep 51

⁶¹ Tracy S Work, 'India Satisfies Its Jones for Arbitration: New Arbitration Law in India' (1997) 10 Transnat'l Law 217

This resulted in the enactment of the 1996 Act. The 1996 Act came as a response to the increasing difficulties expressed by the foreign investors that though India had formalised policies that favoured foreign investments and international business, its adjudicatory mechanism for resolving the disputes arising out of such international transactions was far from satisfactory.⁶² The 1996 Act was based upon the UNCITRAL Model Law on International Commercial Arbitration and its Model Rules.⁶³ The 1996 Act consolidated the earlier acts which separately dealt with domestic and foreign arbitration, and also provided for the explicit provision dealing with the enforcement of foreign awards.⁶⁴

Part II of the 1996 Act deals explicitly with international commercial arbitration and provides for the enforcement of foreign awards under the New York Convention. A foreign award found to be enforceable by an Indian court was now made binding on the parties, as a decree of the court.⁶⁵ This is how India received its first consolidated enactment that aimed at unifying the Indian domestic arbitration law and international commercial arbitration to bring the 1996 Act at par with international practices and procedures.

MARITIME ARBITRATION

Since the early trading days for the modern trading ways, arbitration has been an innate aspect in maritime cases; the reason being that in early maritime trade merchants used to resolve their disputes by taking help of commercial men who have expertise and knowledge of a particular trade. Traders more often used to avoid courts for lack their lack of expertise in the subject area. Therefore, arbitration was the most favourable method of dispute resolution. Arbitration can be defined as a method of dispute resolution wherein the parties mutually submit their dispute to one or more neutral arbitrators(s) who in turn resolves the dispute amicably by rendering an award that is binding on both parties. The majority of trade being contractual in nature, the contract between the parties contains an arbitration clause, called an arbitration agreement. This arbitration agreement contains the provisions for the formation of

⁶² 'India Considering Revised Arbitration Law' (1995) 6 World Arb & Mediation Rep 51

⁶³ 'Indian Adopts New Arbitration Law' [1996] Int'l Arb Rep

⁶⁴ 'Update on Indian Arbitration: The Arbitration and Conciliation Ordinance, 1996' [1996] Mealey's Int'l Arb Rep

⁶⁵ Arbitration and Conciliation Act 1996, s 49

the arbitration tribunal, the seat of the arbitration, the governing law of the arbitration agreement, and the respective court's jurisdiction.

In common parlance, arbitration is called maritime arbitration where the element of commercial dispute involves some maritime aspects like maritime navigation, trade, industry, etc.⁶⁶ It is essential that there must be a connection established between the contractual legal dispute and commercial aspects of the maritime industry to qualify as a subject for maritime arbitration. In other words, many authors have simply equated maritime arbitration with disputes which involve a ship or a vessel.⁶⁷ However, there no rigid definition of maritime arbitration as it is considered as a species belonging to the genus of international commercial arbitration.⁶⁸

'In fact, any arbitration carried out in terms of the London Maritime Arbitrators' Association⁶⁹ might be considered as maritime arbitration. Some typical issues [of maritime arbitration can be]: disputes arising out of charter parties, bill of lading, contracts of affreightments, second-hand ship sales, shipbuilding contracts, marine insurance, associated marine matters, and disputes arising out of marine accidents such as collisions, groundings, salvage, etc.'⁷⁰

'The prime known example of maritime in arbitration matters can be located in ancient Athens and as reported by Demosthenes in his speech *Against Formio*, it dealt with a dispute raised over a contract of carriage of good following the wreck of the ship occurred during the voyage. This demonstrates that as a consequence of the expansion of maritime commerce in the Eastern Mediterranean arbitration has been widely used by the Greek

⁶⁶ W Tetley, 'Marine Cargo Claims' [2008] *Cowansville* 1417; J Allsop, 'International Maritime Arbitration: Legal and Policy Issues' [2007] *Journal of International Maritime Law* 397; Michael Lord, 'Maritime Arbitration: The Call for a Wider Perspective' (1992) 9(2) *Journal of International Arbitration* 5

⁶⁷ B Harris and others, 'London Maritime Arbitration' [1993] *Arbitration International* 275

⁶⁸ Marco Gregori, 'Maritime Arbitration Among Past, Present and Future' [2018] *Kluwer Law International* 329

⁶⁹ The LMAA Terms 2017, cl 3 "the purpose of arbitration according to these Terms is to obtain the fair resolution of maritime and other disputes by an impartial tribunal without unnecessary delay or expense. The arbitrators at all times are under a duty to act fairly and impartially between the parties and an original arbitrator is in no sense to be considered as the representative of his appointer."

<<http://www.lmaa.org.uk/uploads/documents/THE%20LMAA%20TERMS%202017%20Clean.pdf>> accessed 07 May 2021

⁷⁰ Hüseyin Kılıçık, 'History of Maritime Arbitration' (*Global Recovery Services Turkey*)

<<https://www.grstr.com/en/maritime-arbitration.html>> accessed 07 May 2021

traders and in particular by the Athenians, as an alternative to litigation to solve maritime disputes.⁷¹

In the middle ages, seaborne traders used to apply to *lex Maritima*, the usual maritime customs, codes, conventions, and usages of the trade having the scope of universal application with certain exceptions, for resolving disputes with the assistance of a third independent person having technical know-how and expertise on the matter. This method was referred to as arbitration.⁷² Similarly, the growth of maritime arbitration was seen around the world through several statutes and legislations from the thirteenth century onwards. The Maritime Republic of Venice started to function in 1229 and 1255 as formulated by Doge Tiepolo and Doge Rainieri Zeno, respectively⁷³; other simultaneous European developments in maritime arbitration were the Statute of Ligurian, Communes of Varazze in 1345⁷⁴, and Statute of Commune in Celle in 1440⁷⁵ which contained mandatory provisions for the settlement of maritime disputes by expert arbitrators.⁷⁶

These developments laid most of the foundation for maritime arbitration to be followed as a practice in the coming centuries where evidence of it could also be traced in the French revolution at the end of the 18th century. Alongside the world development of commercial maritime arbitration, the same was also adopted in the common law system of England as a part of resolving such disputes and for answering the unsettled questions on the maritime industry. However, with the advent of colonization and growth in State power, and increased recognition of a statute-run judicial system, arbitration as an option saw a downward steep and it started to be considered as a hindrance to the power of the state and the structured judicial system. Though the late 18th century saw a rise in legal systems and increased legislations, the maritime traders across the globe still saw national legislation as an impediment in the area of international trade via sea and thus they preferred making their

⁷¹ Marco Gregori, 'Maritime Arbitration Among Past, Present and Future' [2018] Kluwer Law International 329

⁷² W Tetley, 'The General Maritime Law - The Lex Maritima' [1994] Syracuse Journal of International Commerce 109

⁷³ R Predelli & A Sacerdoti, *Gli Statute Marittimi Veneziani Fino Al 1255* (Venice 1903) 66, 146

⁷⁴ A Roccatagliata, *Gli Statuti di Vazrazze* (Genoa 2001) 60

⁷⁵ M Cerisola, *Gli Statuti di Celle Ligure 1414* (Genoa 1971) 69

⁷⁶ Gregori (n 71)

own 'transnational rules and customs' to ensure uniform global practice and judicial outcomes.

The change in the trend of overall legal development across the countries gave rise to what can be referred to as the modern maritime arbitration the advent of which can be attributed to the American Civil War (1861-1865) where contractual liability in commercial trades overburdened the courts and hence a practice of inserting arbitration clauses in the contract became the norm. Further, with the rise of globalisation, there was an integrated linkage between countries because of global markets and easy communication.

This created opportunities for people from different parts of the world to carry their business by means of a contract to enter into transnational contractual relationships. When a dispute arose between the contracting parties the problem of an appropriate forum to resolve the dispute arose. The disputes could not be referred to the national courts of the respective jurisdiction because of the different domestic laws which would not apply to both parties neutrally and due to the fear of the inability of the national courts of being able to satisfy both the parties independently. Further, there were scepticisms relating to the delay in resolving disputes, corrupt judicial systems, etc. Therefore, a need was felt for harmonisation of maritime law and commercial laws and of an independent adjudicatory body.

'In the first half of the 20th century, attempts at unification and harmonization of commercial law were dominated by maritime law and maritime lawyers.' The earliest convention to harmonise maritime commercial laws came in the form of the 'International Convention for the Unification of Certain Rules of Law relating to Bills of Lading' (hereinafter as the Hague Rules) which were an outcome of the International Brussels Conference of 1924. This convention aimed at ensuring party autonomy, freedom of contract, certainty, and predictability of commercial maritime laws in balance with the interest of global commercial transactions.

Subsequently, international organizations and other UN bodies like International Maritime Organisation (previously known as Inter-governmental Maritime Consultative Organisation), Comite Maritime International (CMI) undertook the task of creating international maritime

conventions, treaties, rules, etc. At the same time in 1926 and 1966, the UNIDROIT and UNCITRAL respectively played a key role in the fast-paced development of international commercial law through their own conventions, model codes, and laws which incidentally also assisted in the development of laws on maritime commerce on the subjects like contract law, international sales of goods and international commercial arbitration.

Being faced with the dual problem of 'domestic jurisdictions of courts' as explained above and 'the hindrance posed by the national laws of each country' in opposition to the growing international contractual relations, harmonization of international laws in the area of maritime, trade, and commercial took place to provide for uniformity in law throughout the international arena. The intermingling of the laws in these two areas has also brought about a trend of placing an arbitration clause in the contracts, not necessarily always as a result of a mandate by international conventions but rather through party autonomy and freedom of contract.

The conjunctive functioning of these international laws have overcome the issues of conflict of domestic laws, and the insertion of arbitration clause has resolved the issues of approaching the national courts by providing an independent neutral adjudicating body in the form of arbitration tribunals/institutions which are not restricted by the laws on any specific jurisdiction. This ultimately paved the way for the growth of maritime arbitration.

CONCLUSION

The study of legal history always gives an impression that the powers or organs of the state vested with the King. The organ of executive and the judiciary as we understand separately today was propagated to be one under the authority of the king. While the King had the judicial powers to adjudicate upon the disputes amongst his subject he could also choose to settle the dispute through amicable settlement without having the distinct connotation of mediation, negotiation, and arbitration. However, evidence suggests that the King also played the role of an arbitrator as understood in the modern legal definition.

Subsequently, when the powers of the king were decentralised, ancillary bodies like Sabha, Samiti, and Guilds continued the process of adjudication and out of court settlement. This

concept is also reflected in the documentation of laws both at national and international level that have formally recognised the concept of the arbitration including as species maritime arbitration. Hence, it would be wrong to say that arbitration is a fairly newer mechanism of dispute resolution when it has already been in existence since ancient Indian and world history.