Arbitration in labour disputes and Arbitration in Commercial disputes - A comparative study

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"Differences we shall always have but we must settle them all, whether religious or other, by arbitration." - Mahatma Gandhi

Black’s Law Dictionary defines legal arbitration as “a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.” Arbitration in labour disputes is concerned with unionized workplace whereas arbitration in commercial disputes refers to arbitration of disputes “to cover matters arising from all relationships of a commercial nature, whether contractual or not”. The biblical story of King Solomon to whom two mothers both claiming maternity of a child came to solve the problem was probably the first recorded evidence of arbitration. Inter-state arbitration in Greece by King Philip the second, father of Alexander, dates back to 337 B.C. Arbitration was connoted in England well before the King’s Court was established. The commercial arbitration in England began in 1224 as a process of bypassing courts. In America it is believed that Native American Indians adopted arbitral processes to resolve disputes. However, after 1492 the arbitration concepts were institutionalised as during initial settlement of the European migrants a large part of the English common law system entered into the American jurisprudence. India is having a long history of arbitration. In ancient India people having disputes used to put it before a group of

1 2nd Year B.A. LL.B.(Hons.)
2 Available at http://karnatakajudiciary.kar.nic.in/hcklibrary/PDF/Blacks%20Law%206th%20Edition%20-%20SecA.pdf
6 Daniel Atkinson, Arbitration or Adjudication, (31 August 2001), online: Atkinson Law http://www.atkinsonlaw.com/DisputeResolution/Arbitration/Arbitration_Article_002.htm
wise people of the society – panchayat - for a binding settlement. The first arbitration law that was enacted in India was Bengal Regulations in 1772 under British Rule.\(^8\)

The present article after briefly portraying the basics of labour and commercial arbitration addresses a comparative study of labour arbitration and commercial arbitration.

**LABOUR ARBITRATION**

When there is a dispute between management and labour union under a collective-bargaining agreement and when all other measures to resolve the issue have been failed, the dispute is referred to an impartial and unprejudiced third party for labour arbitration. Labour arbitration comprises of two major arbitration elements (i) arbitration of rights and (ii) arbitration of interests.\(^9\) Labour arbitration which rests on dispute over existing contracts is arbitration of rights and when the dispute is related to the introduction of new contracts between trade union and management arbitration of interests comes into picture.

**COMMERCIAL ARBITRATION**

Commercial arbitration is a process of resolving a dispute by assigning it to an unbiased third party, an arbitrator, chosen by the parties in dispute for a binding decision on the basis of the arguments conferred and testimonies submitted to the arbitrator. Power of the Judiciary to compel an agreement to arbitrate has heightened the usage of commercial arbitration. The English Arbitration Act, 1889; Arbitration Act 1950 (UK); Federal Arbitration Act of 1925 (USA); and Uniform Arbitration Act 1955 with 1956 amendment (USA) administered judicial enforcement of commercial arbitration agreements.\(^10\) Customarily agreements between members of trade associations, contracts between persons in commerce and industry, and arrangements between tradesmen and consumers often include an arbitration clause citing particular arbitration rules.

Commercial arbitration may be domestic as well as international in nature. In international commercial arbitration business communities of different countries are involved for out of court settlement of the commercial disputes. International commercial arbitration was facilitated by UN Commission on International Trade Law with an aim to harmonize and unify laws related to commercial arbitration across the world.


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LABOUR ARBITRATION VIS-À-VIS COMMERCIAL ARBITRATION

Both the labour arbitration and the commercial arbitration resolutions may be awarded by non-judicial persons but they are generally experts in their respective fields related to the arbitration subject. Still there are important variations between these two which induced comparative study of these two arbitrations.

PURPOSE

Labour arbitration is an alternative to normal court procedure and not an “auxiliary avenue of justice” like commercial arbitration.¹¹ It is a part of collective bargaining process to secure workplace against strikes and work stoppages whereas commercial arbitration is a litigation alternative.¹² Commercial arbitration usually serves businesspersons, consumers, employers and nonunionized employees but labour arbitration serves “unionized employees and their management.”¹³ Labour arbitration arrangement is lodged within the purview of collective bargain agreement, which, being harmonious with the section 301(a) of the Labour-Management Relations Act¹⁴ of the U.S., is legally binding against the union and its management. Here arbitration provisions accommodated within the collective bargain agreement are legal irrespective of traditional contract law doctrines related to the contract enforceability. As per this law the court’s approach towards enforceability and substantiality of labour arbitration is a single contract law question: whether the party opposing arbitration originally consented for arbitration of that particular dispute and if it is so the arbitration agreement is valid and binding. In India provision for voluntary reference of industrial disputes to arbitration lies with section 10A of the Industrial Disputes Act 1947¹⁵ and the dispute once referred to the arbitrator under section 10A could not be referred to labour court and/or other tribunals for adjudication.¹⁶

¹¹ See supra note 8.
¹³ See supra note 2.
¹⁴ 29 U.S. Code §§ 151
¹⁵ Available at http://artassam.nic.in/Industries%20&%20Commerce%20&%20Dept/Industrial%20Disputes%20Act,%201947.pdf
In U.S., section 2 of the Federal Arbitration Act (FAA) \(^{17}\) makes commercial arbitration agreement enforceable but unlike labour arbitration, agreement of commercial arbitration is not the output of statutory mechanism that enforces the parties to build contractual relation; rather this arbitration agreement is enforceable only when the party pursuing imposition of arbitration can establish that it was the result of a free-willed and known agreement. 

Doctrine of labour arbitration rests on industry-specific administrative law with the objective of effective labour dispute settlement. Here the arbitration is dictated by statute. By contrast, under commercial arbitration party autonomy based on common law and international conventions are more focused. Here the arbitration is voluntary.

**POLICY BEHIND**

Public policy and labour arbitration often go hand in hand providing more avenues for the judiciary to intervene but in commercial arbitration application of public policy is very limited to fraud, corruption, misconduct, misbehaviour, notions of morality etc. as mentioned in section 34 of the Arbitration and Reconciliation Act 1996 of India amended in 2015.\(^{18}\) Similar are the views of U.S. Federal Arbitration Act (FAA)\(^{19}\) and English Arbitration Act.\(^{20}\) Moreover, labour arbitration is a private mechanism discharging a public policy like national labour policy. Trade Union’s status is decided by the statute and the employer has no choice but to negotiate and when agreement is signed it is legally enforceable as an element of national policy. Hence labour arbitration is fulfilling dual function of private as well as public.\(^{21}\) But commercial arbitration is purely a private arrangement.

The policies backing labour arbitration is different from the policy supporting the commercial arbitration and they are serving different goals.\(^{22}\) This is distinctly visible when we compare unionized workers’ arbitration (under labour arbitration) with the nonunionized workers’ arbitration (under commercial arbitration). The policies which highlight labour arbitration are (i) agreements backing industrial peace (ii) limited judicial interference and (iii) protection of

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\(^{17}\) 9 U.S. Code §§ 1  
^{20}\) Ibid. Moses, M. L. P-207 & English Arbitration Act of 1996 68(1). The Swedish Arbitration Act also permits a challenge based on "an irregularity....which probably influenced the outcome of the case." 34(6)  
^{22}\) See infra note 18
labour rights\textsuperscript{23}. In \textit{Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke} case\textsuperscript{24} Justice Untwalia had rightly opined

“The powers of the authorities deciding industrial disputes under the Act are very extensive—much wider than the powers of a civil court, while adjudicating a dispute which may be an industrial dispute. The Labour Courts and the Tribunals to whom industrial disputes are referred by the appropriate Government under S. 10 can create new contracts, lay down new industrial policy for industrial peace, order reinstatement of dismissed workmen, which ordinarily a civil court could not do.”

“Here, arbitration is the substitute for industrial strife” whereas the single policy which governs the commercial arbitration is speedy settlement of commercial disputes as a substitute for litigation.\textsuperscript{25}

**FLEXIBILITY**

Agreements in labour arbitration ensure industrial harmony and peace by settling disputes without work stoppage. Collective bargaining agreement is quite different from usual contract agreement where trade union representatives and management repeatedly bargain over terms and conditions over a period of time before signing an agreement and thus making it a “common law of a particular industry or of a particular plant”.\textsuperscript{26} The parties in such agreements have opposing objectives and as it is difficult to apprehend all the conflicts that might arise, the parties opt for general legal rights under the purview of collective bargaining agreement and commonly depend on the arbitrator to interpret the contents of the agreement on the basis of union-management relationship history. Labour arbitration agreement safeguards the interests of the workforce as trade unions representing major workforce enter into the agreement, the management and the union jointly select the arbitrator and both the parties may arbitrate time and again. The parties can agree to cancel the award and go for further arbitration. Thus labour arbitration is more flexible than litigation. If the parties expected an alternate outcome of the arbitration other than that awarded by the arbitrator, they may go for renegotiation and this ability to renegotiate the conditions of the agreement

\textsuperscript{24} \textit{Premier Automobiles Ltd. v. Kamlakar Shantaram}, 1975 II LLJ 445, 450 (SC), \textit{per} Untwalia, J
\textsuperscript{25} \textit{Steelworkers v. Warrior & Gulf Co.}, 363 U.S. 574 (1960)
by both the parties differentiates labour arbitration from commercial arbitration as the later one commonly permits one-time negotiation. Consequently, commercial arbitrations commonly maintain greater compliance in comparison to labour arbitration.

Unlike nonunionised employees under commercial arbitration process, unionised employees get the benefit on two counts (i) their case is represented by experienced, repeat player union leaders having powerful bargaining power (ii) if the trade union representatives do not pursue the case suitably, court remedy can be sought. Nonunionised employees usually sign arbitration agreements as an employment condition and this arbitration agreement falls under commercial arbitration.

CONFIDENTIALITY ISSUE

Confidentiality is one of the key factors of the commercial arbitration but labour arbitration resolutions are not secret. Agreement of labour arbitration needs to be published in the official gazette of the government. In the *Karnal Leather Karmachari Sangathan v. Liberty Footwear Co.* (1990) case 28 the Supreme Court of India held that publication of arbitration agreement in the official gazette is mandatory as per sub-section 3 of Section 10A of the Industrial Disputes Act 1947. 29 Moreover, arbitration award is to be published as per Section 17 of the Industrial Disputes Act 1947 and it was also held by the Supreme Court in the *Sirsilk Ltd. v. Govt. of AP* case. 30

In commercial arbitrations rule of law is applied but the outcome of the arbitration does not make rule of law. In the *Hryniak v. Mauldin* (2014) case 31 it was held that “development of common law” is beyond the purview of private arbitration. But labour arbitration decisions are having precedential value. In the *Local 30 v. Irving Pulp & Paper, Ltd.*, (2013) case 32 Justices Rothstein and Michael opined that “Where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents.”

28 Karnal Leather Karmachari Sangathan v. Liberty Footwear Co., 1990 AIR 247, 1989 SCR (3)1065
29 See supra note 14.
30 Sirsilk Ltd. v. Govt. of AP, 1964 AIR 160, 1964 SCR (2) 448
SIMILARITY

However, the labour arbitration and commercial arbitration have their similarities also. In both the cases the arbitrators can add the parties who are non-signatories. The 2015 amendment of the Arbitration and Reconciliation Act 1996 of India (supra) in Section 8 stating “a party to the arbitration agreement or any person claiming through or under him…” enables referring of non-signatory parties. In this context the decision of Supreme Court of India in the Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) case33 is of relevance. Likewise, in labour arbitration it is the arbitrator who decides whether non-signatories should be joined or not.34 Arbitrators may serve notices to the employers and the employees who are not parties. The beneficiaries or representatives of the deceased employees also come under the purview of collective bargaining agreement’s arbitration awards.35

CONCLUSION

The basic purpose of labour arbitration is quite different from commercial arbitration. They run along parallel trucks. Labour arbitration is a collective bargaining process to maintain industrial peace and harmony, whereas commercial arbitration is simply an alternative to litigation. Labour arbitration is guided by public policy and arbitration resolutions are not secret. But in case of commercial arbitration the role of public policy is very limited and privacy and confidentiality are the most valued features of commercial arbitration. Furthermore, renegotiations and further arbitrations are part and parcel of labour arbitration. However, in both the arbitrations inclusion of non-signatories at the discretion of arbitrators is imperative.

33 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641
34 See Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO v. Casco Fire Protection Inc. 363 F. Supp. 2d 1220 (C.D. Cal 2005) (court concluded that arbitration between the union and both the signatory as well as non-signatory can be compelled by the court and the arbitrator would determine whether the arbitral clause in the labour contract applied to non-signatory parties, the arbitrator has exclusive jurisdiction to interpret the contract).